

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
                  TYLER DIVISION

1 FOR THE DEFENDANT:

2

MR. GREGORY S. AROVAS  
3 KIRKLAND & ELLIS, LLP  
601 Lexington Avenue  
4 New York, New York 10022

5

6 MR. LUKE DAUCHOT  
KIRKLAND & ELLIS, LLP  
7 333 S. Hope Street  
29th Floor  
8 Los Angeles, California 90071

9

10 MR. ADAM ALPER  
KIRKLAND & ELLIS, LLP  
11 555 California St.  
24th Floor  
12 San Francisco, California 94104

13

14 MR. MICHAEL E. JONES  
POTTER MINTON, PC  
15 110 N. College, Ste. 500  
P.O. Box 359  
16 Tyler, Texas 75710-0359

17

18 MR. ROBERT A. VAN NEST  
KEKER & VAN NEST, LLP  
19 633 Sansome St.  
San Francisco, California 94111

20

21

22

23

24

25

1 P R O C E E D I N G S

2 COURT SECURITY OFFICER: All rise.

3 (Jury in.)

4 THE COURT: Please be seated.

5 All right, Mr. Stevenson. You may  
6 proceed.

7 MR. STEVENSON: Thank you, Your Honor.

8 SCOTT NETTLES, Ph.D., PLAINTIFFS' WITNESS,

9 PREVIOUSLY SWORN

10 DIRECT EXAMINATION (CONTINUED)

11 BY MR. STEVENSON:

12 Q. Dr. Nettles, I'd like to now talk with you  
13 about the second non-infringement position for the '223  
14 patent advanced by Defendants and that regards where the  
15 timer begins.

16 A. Yes, sir.

17 Q. In Intel's products, where does the timer  
18 start?

19 A. It starts when the SDU -- the MSDU has been  
20 received by the data link layer.

21 Q. And what -- what is another word for the data  
22 link layer that you've seen in the parlance of the code  
23 for Intel's product?

24 A. In Intel's products, the data link layer  
25 really starts when the MAC starts.

1 Q. MAC, M-A-C?

2 A. Yes, sir, medium access control.

3 Q. Okay. So when the packet enters the MAC,  
4 that's when the timestamp starts, right?

5 A. Yes, sir, when it's received.

6 Q. Okay. Now, counsel for Defendants, during the  
7 examination of Mr. Kitchin, created this handwritten  
8 demonstrative. Do you recall seeing it?

9 A. I do.

10 Q. And I believe the suggestion was that Intel  
11 doesn't infringe this patent because above the MAC layer  
12 where the timer starts, there's another layer in their  
13 products called the logical link layer. You remember  
14 that argument in testimony?

15 A. Yes, sir. It's sometimes referred to as the  
16 LLC.

17 Q. LLC. What does stand for?

18 A. Logical link control.

19 Q. Is this drawing an accurate representation of  
20 the way Intel's products actually work?

21 A. No, sir, it's not.

22 Q. What have you done to confirm or disprove this  
23 drawing and whether it is an accurate representation?

24 A. Well, I looked at the code.

25 Q. The source code for Intel's products.

1 A. Yes, sir.

2 Q. Did you look at the same code that Dr. Gibson  
3 looked at in cross-examination?

4 A. Yes, sir, that same code.

5 MR. STEVENSON: I'd like to approach, if  
6 I may, Your Honor, and hand the witness Exhibit 208D.

7 THE COURT: You may.

8 Q. (By Mr. Stevenson) Tell us what 208D is,  
9 please, Dr. Nettles.

10 A. 208D is a function that is called  
11 htxHandleTxPacketEventComplete.

12 Q. And is this code part of the MAC?

13 A. Yes, sir. This is where the receiving of the  
14 packet from the upper layer is completed and the timer  
15 is set and then the various headers are started --  
16 you're starting to add the various headers onto it in  
17 this code.

18 Q. So -- so what I want us to do is I want you to  
19 walk us through the code and see if it's really true  
20 that as we go through it, we'll see the logical link  
21 layer prior to the MAC layer or if it's vice versa, all  
22 right?

23 A. Yes, sir.

24 Q. So what I'd like to do is first put the code  
25 on the ELMO. This is the first page of it.

1 A. Yes, sir.

2 Q. Now, let's understand how this works. These  
3 are computer program instructions, right?

4 A. Yes, sir.

5 Q. Explain to the jury how computers go about  
6 chugging through these and running them?

7 A. By default, the way computers are going to  
8 work is they're going to do one instructions and they're  
9 going to do the next instruction and then they're going  
10 to do the next instructions. They're going to be  
11 linear.

12 And sometimes there will be ifs and elses, so  
13 there will be some things that they'll do, some things  
14 they won't do. Sometimes there will be loops, but  
15 actually this code doesn't contain any loops.

16 Q. Have you reviewed it carefully?

17 A. Oh, yes, sir.

18 Q. So where does the timer reside in this?  
19 Where -- where do we hit it by line number?

20 A. The timer is just a little bit below where you  
21 are now, at 867 and 868.

22 Q. And we know that by looking at the line  
23 numbers on the right?

24 A. Well, that's how we know the line numbers. We  
25 know that it's the timer because we see that there are

1 two calls here that talk about the timestamp and also  
2 talk about the -- the Tx start time.

3           So we see on -- on the right-hand side, we see  
4 utilGetTimeSinceRebootUseconds (sic). That's the  
5 microseconds since the machine rebooted, and that's  
6 storing that into the packet info. And then there's  
7 also another timer that's getting set in the timer info.

8       Q.    I'm going to mark this timer so we can all see  
9 it.

10      A.    Okay.

11      Q.    Is that fair?

12      A.    Yes, sir.

13      Q.    Okay. Now, where does the MAC header get set?

14      A.    If we go down to Line 865 is probably the most  
15 clear spot.

16      Q.    Okay. So I'm just going to put two pages  
17 together because it goes over. And now we've reached  
18 the section you're talking about. Somebody wrote MAC  
19 header on that. When did that get written?

20      A.    I think that was yesterday during the  
21 examination. That's my recollection.

22      Q.    Dr. Gibson?

23      A.    Yes, sir.

24      Q.    And do you agree with him that this is where  
25 the MAC header gets set?

1           A.    Yes, sir.  It's really that and the subsequent  
2   code is creating the event that will create the MAC  
3   header, and you can see that from the -- easily from the  
4   comment and also on 8 -- 885, you see Create Transmit  
5   MAC Header Phase 1.

6           Q.    Okay.  Now, after the MAC header is created,  
7   is there an LLC or logical link layer header created?

8           A.    Yes, sir, there is.  It's a little further  
9   along.

10          Q.    We're on Page 3 of the code now.  How many  
11   pages do we have to go until we get to the logical link  
12   layer?

13          A.    I think it's about a page and a half.  Maybe  
14   it's two pages.

15          Q.    I'm going through it.  And I believe we marked  
16   it yesterday with Dr. Gibson, and it may be coming up  
17   here.

18          A.    Oh, yes, sir, here it is.  I guess it's more  
19   like three pages.

20          Q.    Okay.  And these -- these lines are -- of code  
21   are all consecutive, so if we're on Line 1047, that's  
22   going to occur after the 800s that you identified?

23          A.    Yes, sir, that's correct.

24          Q.    What is this at 1047 that Dr. Gibson  
25   identified as the LLC header?



1           A.    This is creating the event that will  
2 eventually put on the LLC header.

3           Q.    So does this -- when you say creates an event,  
4 does the header get put on later?

5           A.    Yes, sir.  This whole system is event-driven.  
6 So certain things are going to happen by creating  
7 events.

8           Q.    Okay.  So now let's go back to the diagram.  
9 Now that we understand we have the timer, shortly  
10 afterwards the MAC layer, and then -- MAC header, then  
11 the LLC header.

12          A.    Yes, sir.

13          Q.    What does that sequence of events tell you  
14 about the demonstrative that was created?

15          A.    Well, really there's a part of the MAC which  
16 is above the -- what's called LL layer here, and there's  
17 still a part of the MAC which is below it.

18          Q.    Okay.  Is this accurate?

19          A.    Oh, is this accurate?  No, sir, it's not  
20 accurate.

21          Q.    Can we, right now, revise it to make it more  
22 accurate?

23          A.    Yes, sir, we can.

24          Q.    Can we put some correction tape over this?  
25 How would we change it to make it more accurate?

1           A.    Well, at the bottom I would draw the same  
2 thing -- I'd say MAC layer.

3           Q.    Where does the MAC layer go?

4           A.    Well, I was going to go from bottom to top.

5           Q.    Right here?

6           A.    So right there. That's -- that's the low MAC,  
7 the -- in the Intel products, the MAC is actually  
8 divided into a low MAC and a high MAC.

9           Q.    Okay. What's above the low MAC?

10          A.    That would be the -- the LLC. And then above  
11 that would be more MAC layer. For example, the code  
12 here is from the high MAC.

13          Q.    Is that accurate now?

14          A.    Yes, sir. I mean --

15          Q.    Is this - is the data link layer, these three  
16 layers that we've pointed to right here?

17          A.    Yes, sir. The -- the network layer and the  
18 operating system are just above the routines that we've  
19 been talking about.

20          Q.    Okay. Where does the timer start?

21          A.    Basically when the packet is received by the  
22 data link layer, at the very sort of top of that MAC  
23 layer we've -- we've drawn.

24          Q.    Have you verified this operation in the code?

25          A.    Yes, sir, I have.

1 Q. Is the '222 -- is the '223 patent infringed,  
2 in your opinion?

3 A. Yes, sir, it is, by the -- by the Intel chips  
4 and by the Defendants' products that use Intel chips.

5 Q. Dr. Nettles, a couple of wrap-ups.

6 In doing your work, were you careful to  
7 compare the language in the four corners of the claims,  
8 as defined by the Court, to the Defendants' products and  
9 to the standard?

10 A. Yes, sir, I was.

11 Q. Did you find infringement of all the asserted  
12 claims?

13 A. I did.

14 Q. Let me ask you finally, in doing your work of  
15 comparing claims to accused products, does it matter  
16 whether Ericsson was in attendance at 802.11n meetings  
17 during creation of the standard?

18 A. Not at all. I mean, the whole point is that  
19 you compare the claims to the products.

20 Q. Thank you, Dr. Nettles.

21 MR. STEVENSON: I'll pass the witness.

22 THE COURT: All right. Cross-exam?

23 MR. VAN NEST: It will take me a moment  
24 to set up, Your Honor.

25 THE COURT: All right.

1 (Pause in proceedings.)

2 MR. STEVENSON: Your Honor, may I -- Your  
3 Honor, I will sticker the document that I used on the  
4 ELMO as Plaintiff's Exhibit Demonstrative 19.

5 THE COURT: All right. So marked.

6 MR. STEVENSON: And I also tender to the  
7 Court Plaintiff's Exhibits Demonstratives 13 through 18,  
8 as well.

9 THE COURT: All right.

10 COURT REPORTER: I didn't hear you, Mr.  
11 Stevenson. Through what?

12 MR. STEVENSON: 13 through 18.

13 THE COURT: So tendered.

14 MR. VAN NEST: Good afternoon. We have  
15 to have a few props.

16 Good afternoon, Ladies and Gentleman.

17 CROSS-EXAMINATION

18 BY MR. VAN NEST:

19 Q. Good afternoon, Dr. Nettles. Welcome back.

20 A. Good afternoon.

21 Q. I'd like to start where you did and talk a  
22 little about the reference that Dr. Heegard discussed  
23 yesterday, the -- the ETSI reference.

24 A. Yes.

25 Q. And that's -- that's a reference that was

1 discussed in connection with the '625 patent, correct?

2 A. Yes, sir, it was.

3 Q. Now, the ETSI reference that Dr. Heegard  
4 talked about, the Patent Office was not aware of that  
5 reference, was it?

6 A. That's my understanding, yes.

7 Q. It was not presented to the Patent Office  
8 during the examination of the patent, right?

9 A. That's my understanding, yes, sir.

10 Q. So the first fact-finder to evaluate that  
11 reference in connection with this particular patent,  
12 that's our jury right here today, right?

13 A. Yes.

14 THE COURT: Counsel? Counsel, I  
15 apologize, but I have to take a very important  
16 conference call, so we'll have to be in recess for about  
17 15 minutes.

18 MR. VAN NEST: Thank you, Your Honor.

19 COURT SECURITY OFFICER: All rise.

20 (Jury out.)

21 (Recess.)

22 COURT SECURITY OFFICER: All rise for the  
23 jury.

24 (Jury in.)

25 THE COURT: All right. Please be seated.

1 All right. You may proceed.

2 MR. VAN NEST: Thank you, Your Honor.

3 Q. (By Mr. Van Nest) Dr. Nettles, before we took  
4 a short break there, I think we established that no one  
5 in the Patent Office saw the ETSI reference before this  
6 '625 patent issued, correct?

7 A. Yes, sir, that's my understanding.

8 Q. And the first fact-finder to look at it in  
9 connection with the patent is our jurors here in this  
10 trial, right?

11 A. Yes, sir, that's to my understanding.

12 Q. And you know that a printed publication is  
13 just as good as a patent in terms of evaluating it as  
14 prior art, right?

15 A. Oh, yes, sir, I do.

16 Q. You don't have to have a patent as prior art;  
17 a publication will be good enough, right?

18 A. Absolutely.

19 Q. In some cases a presentation will be good  
20 enough?

21 A. In some cases.

22 Q. In some cases a product would be good enough?

23 A. Yes, sir.

24 Q. But certainly the ETSI reference, that's a  
25 publication, right?

1 A. That's my understanding, yes, sir.

2 Q. Okay. And I think you mentioned this, but in  
3 evaluating invalidity, it's sort of the flip side of  
4 infringement. You have to compare the reference against  
5 all the claims of the patent, correct?

6 A. Yes, sir.

7 Q. And you're looking to see if the reference  
8 discloses each and every element -- for example, here,  
9 of Claim 1, right?

10 A. Yes, sir, that's correct.

11 Q. And we've -- we've gone over this before?

12 MR. VAN NEST: May I approach the board,  
13 Your Honor?

14 THE COURT: Yes, you may.

15 Q. (By Mr. Van Nest) We've gone over this before,  
16 but obviously these are the elements of Claim 1 that  
17 have to be met to establish infringement, right?

18 A. Yes, sir, that's correct.

19 Q. And the same would be true on invalidity.  
20 These elements have to be met to establish invalidity in  
21 a prior art reference?

22 A. Yes, sir, that's correct.

23 Q. Now, the only element that you talked about  
24 during your direct exam was this commanding step, right?  
25 That's the one that you identified as missing from ETSI?

1 A. Yes, sir, that's correct.

2 Q. And I know that you studied the figure that  
3 Dr. Heegard talked about yesterday, correct?

4 A. I did.

5 Q. This is the ETSI figure from DX 120 that Dr.  
6 Heegard showed the jurors yesterday, right?

7 A. Yes, sir, that's correct.

8 Q. And the '625 patent, as we've already  
9 established, involved an effort to overcome deadlock,  
10 right?

11 A. Yes, sir, that's correct.

12 Q. And the ETSI reference was also an effort by  
13 the ETSI inventors over in Aachen to overcome deadlock,  
14 right?

15 A. Yes, sir, I would agree with that.

16 Q. And one of the ways in which they did it was  
17 to disclose a discard notice, right?

18 A. Yes, sir, that's correct.

19 Q. And this discard notice is a packet with a  
20 sequence number with a discard notice attached. I think  
21 you used the word piggybacked, right?

22 A. Yes, sir, that's what's disclosed here.

23 Q. And just so our jurors have it, this -- this  
24 discard notice is actually depicted on the ETSI  
25 reference here in Figure 11, right?



1 A. Yes, sir, it is.

2 Q. And it's it in the context of an ARQ system  
3 with a transmitter and a receiver, right?

4 A. Absolutely.

5 Q. And it's sending data packets from the  
6 transmitter to the receiver?

7 A. That's right.

8 Q. And then there are acknowledgement messages  
9 back from the receiver to the transmitter?

10 A. Yes, sir.

11 Q. And then in ETSI, the Aachen folks, they said,  
12 a way to force the system to move on would be to send a  
13 regular data packet -- this happens to be data packet  
14 with Sequence No. 5 and discard notice along with it,  
15 right?

16 A. Yes, sir, they said that the discard notice  
17 would be piggybacked -- this discloses that the discard  
18 notice is piggybacked on the fifth sequence number data  
19 frame.

20 Q. And that's what they said -- and that's what  
21 Dr. Heegard said represented a command to receive,  
22 right?

23 A. That's what he identified. I don't agree with  
24 him.

25 Q. Okay. I just want to be sure. I think what

1 you told our jurors this morning was that in your  
2 opinion, a regular data packet with a sequence number  
3 and a discard notice that does nothing more than move  
4 the window, that's not a command to receive.

5           Isn't that what you said this morning?

6           A.    The point I'm making here is that there's no  
7 disclosure in this reference of a command to receive.

8           Q.    You said, I believe, Dr. Nettles, that a  
9 discard notice piggybacked onto a normal packet with a  
10 sequence number, in your view, that's not a command to  
11 receive, right?

12          A.    In this context, yes, sir, right.

13          Q.    And you said you agreed with Dr. Gibson, who  
14 also says that a regular data packet with a discard  
15 notice is not a command to receive, right?

16          A.    No, sir, I don't think I can agree with that.

17          Q.    I believe you referenced Dr. Gibson in your  
18 testimony this morning, did you not?

19          A.    I did.

20          Q.    And what you said was you agree with him, that  
21 a discard notice on a regular data packet with a  
22 sequence number that only moves the window, that's not a  
23 command to receive, right?

24          A.    No, sir, I can't agree with that.

25          Q.    In any event that's your view?

1 A. Yes, sir.

2 Q. Okay. Now, you showed us some testimony this  
3 morning from Dr. Larsson. He's one of the inventors,  
4 right?

5 A. He is, yes.

6 MR. VAN NEST: Could we put that  
7 testimony up, please, Jeff?

8 Q. (By Mr. Van Nest) And this is the testimony  
9 that you showed the jury in which he said if you had a  
10 system where you could send regular data packets and all  
11 you were doing is move the window, you wouldn't need a  
12 command to receive, right? That's what he said?

13 A. He said some additional things, but, yes, sir,  
14 this is what he said.

15 Q. Now, doesn't Mr. Larsson still --

16 MR. VAN NEST: Withdraw that.

17 Q. (By Mr. Van Nest) You said you thought he was  
18 mistaken or wrong, right?

19 A. No, sir. I -- I said I thought that the  
20 question was phrased in an ambiguous way and that he  
21 answered what he thought the question was.

22 Q. Now, you know, having given depositions, that  
23 if the witness feels that he misunderstood the question  
24 or he got the answer wrong, he has the right to correct  
25 it in writing in the transcript, right?

1 A. Yes, sir, that's correct.

2 Q. And that was never done by Mr. Larsson, was  
3 it?

4 A. No, sir, it wasn't.

5 Q. And Mr. Larsson never came here to testify,  
6 did he?

7 A. No, sir, he didn't.

8 Q. And he's not coming either, is he?

9 A. Not to the best of my knowledge.

10 Q. And he still works for Ericsson, doesn't he?

11 A. I think that's correct.

12 Q. Now, as a matter of fact, last week you agreed  
13 with his statement in your testimony under oath when you  
14 and I were having a discussion, didn't you?

15 A. I think I agreed that Mr. Larsson said this.

16 Q. Well, let's look at it.

17 MR. VAN NEST: Can we get Dr. Nettles'  
18 transcript, Page 66, line 7 through 10 up, please.

19 Q. (By Mr. Van Nest) I asked you just last  
20 Wednesday: Okay. And you also said that if a receiver  
21 could already receive a packet, you wouldn't need a  
22 command to receive it, right?

23 Answer. Yes, sir.

24 You gave that testimony didn't you?

25 A. Yes, sir. I think this is in reference to

1 some of my deposition testimony, but that's correct.

2 Q. Now, you gave us an analogy of a grocery store  
3 door, that if you stand on the pad and the door opens,  
4 that's a command to open the door? Is that what you  
5 said this morning?

6 A. Actually I think the grocery store had an  
7 electric eye; but, yes, sir, that's basically what I  
8 said.

9 Q. So you -- you walk in the door, you hit the  
10 electric eye, the door opens, and in your view, in your  
11 world, in your testimony, that's a command to receive --  
12 a command to open, right?

13 A. Yes, sir, because the door is designed and  
14 programmed that way.

15 Q. Now, I take it if the door is always open, you  
16 don't need a command to open it, do you?

17 A. I would agree with that.

18 Q. Now, you've identified again today a standard  
19 data packet that -- with a sequence number as something  
20 that infringes the '625 patent, right?

21 A. Yes, sir, that's correct.

22 Q. Now, as a matter of fact, in the '625 patent  
23 itself, the inventors describe exactly that thing as  
24 prior art that they did not invent, right?

25 A. No, sir, I can't agree with that.

1                   MR. VAN NEST: Could we have Figure 5  
2 from the '625 patent up, please?

3           Q.    (By Mr. Van Nest) I've -- I've correctly  
4 displayed Figure 5 from the patent, right?

5           A.    Yes, sir.

6           Q.    This is the '625 patent, right?

7           A.    Yes, sir.

8           Q.    Written by the inventors and approved by the  
9 Patent Office, right?

10          A.    Yes, sir.

11          Q.    And what's being depicted here is a data  
12 packet with data, a header, and a sequence number,  
13 right?

14          A.    That's correct.

15          Q.    And the inventors of the '625 patent said  
16 that's in the prior art. We didn't invent that. Didn't  
17 they?

18          A.    Yes, sir, that's correct.

19          Q.    All right. Let's turn to the '435 patent.  
20 That's the one that requires a computation -- and I just  
21 want to be sure that -- whoops, I'm sorry, Dr. Nettles.

22          A.    Okay.

23          Q.    You all right?

24          A.    It didn't hit me.

25          Q.    Good. Lucky these are light, or we would all

1 be in trouble.

2 Now, the '435 patent, this is the one that  
3 requires computing which data packets have been  
4 discarded by the transmitter, right?

5 A. Yes, sir, that's correct.

6 Q. We had some discussion about that also on  
7 Wednesday. I want to put my animation board up here.

8 MR. VAN NEST: May I approach here, Your  
9 Honor?

10 THE COURT: Yes, you may.

11 Q. (By Mr. Van Nest) Just to be clear, what's  
12 required by this claim is that the receiver on the right  
13 compute the packets that have been discarded at the  
14 transmitter, right?

15 A. Yes, sir, that's correct.

16 Q. And as I think you said last week, if the  
17 receiver cannot compute all of the packets that were  
18 discarded by the transmitter, there's no infringement,  
19 correct?

20 A. Yes, sir, that's correct.

21 Q. You also testified that when a BlockAck  
22 request is sent from the transmitter to the receiver,  
23 that request will not allow a receiver to identify which  
24 of the previously acknowledged packets have been  
25 discarded. Didn't you give that testimony just on

1 Wednesday?

2 A. Yes, sir, I did.

3 Q. And you further said the same is true when you  
4 send an A-MPDU. When that message is sent from the  
5 transmitter to the receiver, that message will not allow  
6 the receiver to determine or identify which of the  
7 previously acknowledged packets have been discarded.

8 You gave that testimony, as well?

9 A. Yes, sir. I think that was in reference to  
10 packets that had actually been discarded because of  
11 time-outs, not because of receiving ACKs.

12 Q. But you're standing on that testimony from  
13 last week right, Dr. Nettles, right?

14 A. Oh, yes, sir.

15 Q. Now, you were here when Dr. Kitchin was  
16 examined, were you not?

17 A. Yes, sir. I think it's Mr. Kitchin.

18 Q. Mr. Kitchin, from Intel?

19 A. Yes, sir.

20 Q. And he was asked whether or not the Intel  
21 chips performed this computation, and he said no, right?

22 A. Yes, sir, I believe that's correct.

23 Q. He denied that the Intel chips performed a  
24 computation in the receiver of packets discarded in the  
25 transmitter, right?



1 A. That's my recollection, yes, sir.

2 Q. And then he was asked: As a computer  
3 engineer, hey, if there were such a computation,  
4 wouldn't it be reflected in the source code?

5 And he said, yes, didn't he?

6 A. That's what I remember, yes, sir.

7 Q. And he was asked: Well, you weren't shown any  
8 source code. Is there any source code that performs  
9 this computation?

10 He said: No. I wasn't shown any, and there  
11 isn't any. It doesn't exist.

12 Right?

13 A. That's what he said, yes, sir.

14 Q. Now, that happened on Thursday morning of June  
15 the 7th, right -- June the 6th?

16 A. I -- I don't remember the dates exactly, but I  
17 take your word for it.

18 Q. And you and your team spent all weekend  
19 looking at source code from Intel, Atheros, and  
20 Broadcom, right?

21 A. We looked at source code this weekend, yes,  
22 sir.

23 Q. As a matter of fact, you went straight from  
24 here over to Mr. Jones's office and spent all day Friday  
25 looking at the Intel source code, right?

1           A.    We looked at Intel source code on Friday, yes,  
2   sir.

3           Q.    You had -- Mr. Jones was serving you coffee.  
4   You were in his office.   The source code was there, and  
5   you reviewed it?

6           A.    Absolutely.

7           Q.    And then your team reviewed Atheros source  
8   code, Broadcom source code.   All weekend long your team  
9   was analyzing source code from Intel, Broadcom, and  
10   Atheros, right?

11          A.    Oh, yes, sir.

12          Q.    The total amount of time you spent on the  
13   Intel code was 15 hours, roughly?

14          A.    Roughly, yes, sir.

15          Q.    All right.   And another eight on the Atheros  
16   code, approximately?

17          A.    Yes, sir.

18          Q.    And probably five or six on Broadcom, right?

19          A.    Yes, sir.

20          Q.    You had a team of yourself and how many other  
21   people looking at source code?

22          A.    Two other people.

23          Q.    And I take it you've elected not to show our  
24   jury today any source code from Intel, Atheros, or  
25   Broadcom that reflects any computation that the receiver

1 of all of the packets discarded at the transmitter,  
2 right?

3 A. We haven't shown source code concerning that,  
4 that's correct.

5 Q. Now, let's turn to the '215 patent. That's  
6 the one that requires multiple feedback types, right?

7 A. Yes, sir.

8 MR. VAN NEST: I'll try to move this  
9 board before I get the other one up.

10 Q. (By Mr. Van Nest) Now, the '215, that is a  
11 method claim, right?

12 A. Yes, sir, it is.

13 Q. There are method claims and there are  
14 apparatus claims, but this one is a method claim,  
15 correct?

16 A. It is.

17 Q. And with a method claim, Ericsson has the  
18 burden to prove that each step in the method is being  
19 performed, right?

20 A. That's correct.

21 Q. Because if even one step is missing, there's  
22 no infringement, as I think we established last week,  
23 right?

24 A. That's correct.

25 Q. And so let's review these steps. First of

1 all, this is a method for minimizing feedback in an ARQ  
2 protocol, correct?

3 A. Yes, sir, that's the preamble.

4 Q. And Step 1 requires sending a plurality of  
5 first data units over a communication link, right?

6 A. Yes, sir, that's correct.

7 Q. So that means sending packets from a  
8 transmitter probably to a receiver, right?

9 A. Yes, sir.

10 Q. And -- and in the language we've been using,  
11 these data units, they're packets, right?

12 A. Yes, sir.

13 Q. So Step 1, you have to send it from the  
14 transmitter to the receiver, right?

15 A. Yes, sir.

16 Q. Step 2, it has to be received by the receiver.  
17 So the data packets have to be received by a  
18 receiver, right?

19 A. Yes, sir, that's correct.

20 Q. That's step 2.

21 Then Step 3 in this method claim, is that  
22 something has to be done in response to receiving those  
23 packets, right?

24 A. Yes, sir, that's correct.

25 Q. And that something has to be, as the Court has

1 defined it, constructing a message field for a second  
2 data unit, right?

3 A. That's correct.

4 Q. So Step 3, which can't happen until there's  
5 been data received in Step 2, is I construct a message  
6 field in response to that, right?

7 A. Yes, sir, that's correct.

8 Q. So the way this claim is laid out, Step 3  
9 happened after Step 2 because it has to respond to Step  
10 2, right?

11 A. Oh, absolutely, yes, sir.

12 Q. And you said that this patent requires  
13 generating a message from among a number of different  
14 message types, right, as part of that third step?

15 A. Well, yes, sir, that's part of the claim  
16 construction.

17 Q. That's right. And you -- you accept that and  
18 you acknowledge that, right?

19 A. Well, I applied the claim construction,  
20 absolutely.

21 Q. And so what must happen in order for this  
22 claim to be infringed is that after a packet is received  
23 by the receiver, the receiver has to generate a message  
24 field which identifies a type from a number of different  
25 message types, right?

1 A. Yes, sir, that's exactly correct.

2 Q. Now, in the products that you reviewed of  
3 Intel, Atheros, Broadcom, and everybody else, the  
4 receiver is only capable of generating one message type,  
5 a compressed BlockAck, right?

6 A. Well, yes, sir. But that compressed  
7 BlockAck -- the Multi-TID and compressed BlockAck field  
8 identifies the message type or the feedback response.  
9 That's what's required.

10 Q. Dr. Nettles, the devices you analyzed and  
11 tested over and over and over again, only generated one  
12 message type, right?

13 A. Oh, yes, sir.

14 Q. They didn't generate more than one; they  
15 generated only one, right?

16 A. That's correct.

17 Q. And that only one was a compressed BlockAck,  
18 which is the only one those receivers are capable of  
19 generating, right?

20 A. Oh, yes, sir. I agree with that completely.

21 Q. All right. Let's talk about the '568. I  
22 thought I heard Mr. Stevenson state -- say that somehow  
23 Mr. Gibson had admitted that Ekiga was using the  
24 invention. Did you hear that?

25 A. That was my understanding of Dr. Gibson's

1 testimony, yes, sir.

2 Q. But that's not what he said, is it?

3 A. Well, that was my understanding.

4 Q. Dr. Gibson was here all day -- seemed like all  
5 day to me -- testifying that there is no infringement of  
6 this claim or any other, right?

7 A. He did testify to that, yes, sir.

8 Q. Just so we get on the same page, we're now  
9 talking about the '568, the service type identifier  
10 patent, right, identifying the type of data conveyed in  
11 the payload, correct?

12 A. Yes, sir.

13 Q. You know that's not what Dr. Gibson said,  
14 don't you?

15 A. Well, my understanding is that he explained  
16 that when he tested Ekiga -- and we saw evidence to this  
17 effect -- that it generated a TID of 5 which  
18 corresponded to video.

19 Q. Let's actually --

20 MR. VAN NEST: Can we put up Dr. Gibson's  
21 testimony from yesterday?

22 Q. (By Mr. Van Nest) Mr. Stevenson asked him:  
23 Ekiga is using this invention, isn't it?

24 And the answer was: In this call, Ekiga  
25 assigned a TID of 5.

1 Question: It's using the invention, right?

2 Answer -- he's asking back if he heard it

3 right.

4 Ekiga is using the invention, you said?

5 Question: Yes. That's what you tested,

6 right?

7 Yes.

8 That was the testimony that Dr. Gibson gave

9 yesterday here in court, right?

10 A. Yes, sir.

11 Q. Now, as a matter of fact, you also tested

12 Ekiga as part of your work in preparing to offer

13 opinions in this case, right?

14 A. I did.

15 Q. And you -- you set up a -- let's back up a

16 minute. Ekiga is a video conferencing system like

17 Skype?

18 A. Yes, sir, that's correct.

19 Q. You can use video or voice or both, right?

20 A. That's correct.

21 Q. And you set it up to use both. Is that what

22 was in your experiment?

23 A. I think we experimented with both, but

24 primarily video.

25 Q. Primarily video. So you were running video?



1 A. Yes, sir.

2 Q. And you ran a series of packets which you  
3 knew, because you set the thing up, had video data in  
4 them, right?

5 A. Yes.

6 Q. You knew that ahead of time?

7 A. Yes, sir.

8 Q. You set it up that way to see how the test  
9 would come out, right?

10 A. Yes, sir.

11 Q. And you ran it with this Wireshark or some  
12 other technique that would detect what the TID value was  
13 in the packets, right?

14 A. Yes, sir.

15 Q. And the results showed that you got different  
16 TID values for the same type of data, right?

17 A. I think for Ekiga it was consistent; but yes,  
18 sir, that's correct in general.

19 Q. In general, with your Ekiga testing -- let's  
20 stick right on Ekiga -- sometimes the TID value was 5  
21 and sometimes it was 0, right?

22 A. Yes, sir.

23 Q. So for the same type of packet that you knew  
24 was video, sometimes the TID value was 5 and sometimes  
25 the TID value was 0. That's what your tests showed,

1 right?

2 A. Yes, sir.

3 Q. And doesn't that just prove what you told me  
4 last week, which is that an application can assign any  
5 TID value it wants to any kind of data, right?

6 A. Yes, sir.

7 Q. If the application is running video, it  
8 doesn't have to use a 4. It can use a 0 or a 1, right?

9 A. Yes, sir.

10 Q. And someone running voice, they can assign a  
11 7, a 5, a 1, a 2, or a 3; anything they want, right?

12 A. Yes, sir.

13 Q. And the system will run those packets,  
14 whatever TID value they have, regardless of what's  
15 inside the packet, right?

16 A. Yes, sir, that's correct.

17 Q. And as you told me last week point-blank,  
18 that's why an 802.11n system cannot determine from the  
19 TID value whether the data in the payload is video,  
20 voice, Internet, or multimedia, right?

21 A. Yes, sir.

22 Q. Now, let's turn to the '223. Last patent.

23 Now, I thought I heard you testify just a  
24 little while ago that you think fragmenting and  
25 segmenting are two different things. Is that what I

1 heard you say?

2 A. Yes, sir, they're related, but they're  
3 different.

4 Q. Now, last week you said they both involve --  
5 they both involve breaking things down into smaller  
6 units and reassembling them, right? Didn't you tell me  
7 that?

8 A. In general, that's correct.

9 Q. And you're standing by that testimony, too?

10 A. I am.

11 Q. And you know full well that the inventors of  
12 the '223, when they used the word segmenting, they meant  
13 splitting up data packets into smaller units, right?

14 A. That's not my understanding from reading the  
15 claims.

16 Q. Let's take a look at the deposition of Mr.  
17 Wager at Page 107, Line 22 through 108, Line 2.

18 Mr. Wager is one of the inventors of the '223,  
19 correct?

20 A. Yes, sir, that's correct.

21 Q. He also didn't show up to testify, right?

22 A. That's correct.

23 Q. What he says, though, is that: The  
24 transmitter would take the service data unit at the data  
25 link layer and package it in PDUs, or protocol data

1 units, for transmission out to the receiver; is that  
2 correct?

3 Answer: It segments the SDU, so it splits it  
4 up in smaller parts.

5 That's what the inventor thought he invented  
6 in the '223, right?

7 A. That's what he says in this testimony, yes,  
8 sir.

9 Q. And he gives additional testimony --  
10 additional testimony in which he confirms, looking at  
11 the patent itself, that segmenting means splitting PDUs  
12 up, right?

13 A. Yes, sir.

14 Q. Let's take a look at the Wager depo, Page 114,  
15 Lines 13 through 19.

16 Now he's looking at the patent, Figure 2.

17 The question is: All right. So now the SDU  
18 in Figure 2, what we see is that the SDU is split up  
19 into multiple PDUs?

20 Yes.

21 Okay. And that's what we referred to as  
22 segmenting.

23 Answer: Yes.

24 Right?

25 A. Yes, sir, that's what he says here.

1 Q. Now, you know that one of the other inventors  
2 says fragmenting and segmenting, they're the same thing,  
3 right?

4 A. Yes, sir.

5 Q. As a matter of fact, he says they are  
6 interchangeable, right? Interchangeable?

7 A. I don't remember that specific word, but I  
8 believe you.

9 Q. Well, let's put --

10 MR. VAN NEST: Do we actually have Mr.  
11 Ludwig's testimony from his deposition at Page 49, Lines  
12 4 through 10?

13 (Video clip playing.)

14 QUESTION: And I believe you used the  
15 term fragmentation for this. Is another word for that  
16 segmentation?

17 ANSWER: Correct.

18 QUESTION: And do you see those as  
19 interchangeable?

20 ANSWER: In my definition of the terms, I  
21 would say they're interchangeable.

22 (End of video clip.)

23 Q. (By Mr. Van Nest) So Dr. Ludwig -- Mr.  
24 Ludwig -- this is another inventor on the '223, right?

25 A. Yes, sir.

1 Q. He also did not come and testify?

2 A. That's correct.

3 Q. Do you know whether he's still employed at  
4 Ericsson?

5 A. No, I don't.

6 Q. You don't?

7 Both he and Wager have the same view, that segmenting  
8 means splitting up smaller pieces, fragmenting, correct?

9 A. That's my understanding, yes, sir.

10 Q. Now, you are accusing something in the  
11 devices -- the products that isn't called fragmentation  
12 or segmentation, right?

13 A. It's not called that, that's correct?

14 Q. Speaking of a different word, it's called  
15 encapsulation, right?

16 A. Well, not in the code; but, yes, sir.

17 Q. And encapsul -- that's what you call it,  
18 encapsulation, right?

19 A. That would be one description, yes, sir.

20 Q. Well, that's the description you used, isn't  
21 it?

22 A. Yes, sir.

23 Q. Last week that's what we agreed on?

24 A. Yes, sir.

25 Q. Okay. So you would agree with me,

1 encapsulation -- that's a really different word from  
2 segmentation, right?

3 A. They're both different words, yes, sir.

4 Q. Yes, they are.

5 And I think you said that what fundamentally  
6 happens in encapsulation is you take a packet, you don't  
7 split it up, you don't cut it into smaller pieces, you  
8 just put a header around it, you put it in a box.

9 Right?

10 A. Yes, sir.

11 Q. And you confirmed that this morning. In your  
12 view, segmentation, fragmentation, they all mean taking  
13 a packet, not splitting it, not cutting it, not making  
14 it smaller, but just dropping it in a box. Right?

15 A. I'm afraid I didn't quite follow your  
16 question. It seemed like you talked about segmentation  
17 and fragmentation at the same time.

18 Q. Now, with respect to the source code that you  
19 showed the jurors this morning -- by the way, is this  
20 something that you identified this weekend, or did you  
21 have this before you went out on your -- your source  
22 code adventure?

23 A. Well, that's discussed in my report, sir.

24 Q. Now, you've actually changed your testimony  
25 from last week on whether or not the logical link layer

1 is above or below the MAC, haven't you?

2 A. Not to the best of my recollection, no, sir.

3 Q. I think the drawing you put before the jurors  
4 today showed the MAC layer and then the logical link  
5 layer and then you drew another MAC layer on top of it,  
6 right?

7 A. I did, yes, sir.

8 Q. Now, last week when we were discussing this  
9 very same subject, on Wednesday afternoon, you said:  
10 After the packets arrive at the logical link  
11 layer, after that, they then go into the MAC layer.

12 Right?

13 A. Yes, sir.

14 Q. That was testimony that you gave on the record  
15 under oath last week?

16 A. Yes, sir.

17 MR. VAN NEST: Could we take a look at  
18 that? It's actually Page -- it's the afternoon of June  
19 5th, Page 85, 25 through 86, Line 3. I'm showing 85 at  
20 25 to 86, Line 3. Is that not right?

21 Q. (By Mr. Van Nest) In any event, you recall the  
22 testimony. It was just a few days ago, and that's what  
23 you said, right?

24 A. That's my recollection.

25 Q. Okay. Now, you then identified in the source



1 code a line that you say shows where the headers for the  
2 MAC layer are placed -- where the timer is initialized,  
3 right?

4 A. Yes, sir, I did.

5 Q. That's what you showed us.

6 MR. VAN NEST: Could I have the -- the  
7 document control here? Let's see, I can actually do it  
8 myself. There we go.

9 Q. (By Mr. Van Nest) I think you said -- it's  
10 down there around Line 868 or 867, somewhere in there,  
11 that's what you called the point at which the timer was  
12 initialized, right?

13 A. Yes, sir, that's correct.

14 Q. Now, in this particular -- and then you said,  
15 well, the logical link layer header comes on later --  
16 further down in the code, right?

17 A. Yes, sir.

18 Q. Actually there's a reference to getting the  
19 pointers for the logical link layer before this  
20 reference in the source code, correct?

21 A. Yes, sir. There's some discussion of the LLC  
22 above that.

23 Q. Above that. Now, you didn't show this to the  
24 jury, right?

25 A. No, sir, we didn't.

1 Q. No. And this says get the first buffer from  
2 the packet and set the pointers to the MAC header and  
3 the LLC header. Do you see that?

4 A. Yes, sir, I do.

5 Q. That occurs at Line 844 and 845?

6 A. It does.

7 Q. And according to you, that's earlier in time  
8 than what happens further -- further down the page,  
9 correct?

10 A. That's correct.

11 Q. And I think you testified last week, in  
12 connection with this same issue, that the way the  
13 packets operate and move through the system, they come  
14 from above to the logical link layer first and then to  
15 the MAC, right?

16 A. I think I was referring to the model at that  
17 point; but, yes, sir.

18 MR. VAN NEST: I have nothing further  
19 Your Honor. Pass the witness.

20 THE COURT: All right. Redirect?

21 REDIRECT EXAMINATION

22 BY MR. STEVENSON:

23 Q. Dr. Nettles, let's leave off with -- or start  
24 off with where we left off, and that's with the code.  
25 I've highlighted the lines Mr. Van Nest talked to you

1 about.

2 First question: What kind of lines are those  
3 of code?

4 A. Well, those specific lines are comments.

5 Q. Comments?

6 A. Yes, sir.

7 Q. Okay. Read the comments and explain what they  
8 mean.

9 A. It says: At sign ipeer -- get the first  
10 buffer from the -- excuse me, I can't -- let me read  
11 from my -- my version. Get the first buffer from the  
12 packet and set the pointers to the MAC header and the  
13 LLC header (LLC - for NDIS 6.0 only).

14 Q. Okay. How does that affect your testimony, if  
15 at all?

16 A. It doesn't. This isn't really talking about  
17 the LLC header itself. It's talking about getting a  
18 buffer where we're going to create some space for the  
19 LLC header, and that -- that's what's happening here.

20 We're going to set the pointer to where in  
21 this chunk of data we're going to put the MAC header and  
22 the LLC header.

23 Q. Okay. Does this have any impact on your  
24 testimony showing the actual executing lines of code;  
25 that first the MAC header goes on, then the LLC header

1 goes on?

2 A. No, sir, it doesn't.

3 Q. Do you stand by your testimony about the data  
4 link layers and the MAC layers as you drew them out  
5 here -- or I drew them out, upon your testimony, on the  
6 ELMO?

7 A. I do.

8 Q. Next question, the testimony of Mr. Wager. Do  
9 you remember seeing that with Mr. Van Nest just now?

10 A. Yes, sir, I do.

11 Q. And there was some testimony about the size of  
12 SDUs and protocol data units. Do you remember that?

13 A. That's correct.

14 Q. I'd like to show you the rest of that  
15 testimony that he didn't show you. It's at 107:22 to  
16 108:12.

17 MR. STEVENSON: Will you zoom in on that,  
18 please, Mr. Diaz? See if we can arrange those so  
19 they're visible.

20 Q. (By Mr. Stevenson) All right. So what he read  
21 you was: Then the transmitter would take the service  
22 data unit at the data link layer and package it into  
23 PDUs or protocol data units for transmission out to the  
24 receiver.

25 He answered: It segments the SDU, so it

1 splits it up in smaller parts.

2           Then he rephrases it using it the way you put  
3 it.

4           And the attorney for the Defendants then asked  
5 Mr. Wager: In connection with your patent and the  
6 cellular systems you were working on, the transmitter  
7 will take the service data unit, or SDU, and segment it;  
8 or, in other words, split it up into smaller parts to be  
9 placed into smaller protocol data units or PDUs. Is  
10 that correct?

11           And he said: It's correct, but they may also  
12 be bigger.

13           A. Yes, sir.

14           Q. How does that affect your view of the way the  
15 invention should be interpreted?

16           A. It doesn't change -- none of his testimony  
17 changes my view of how the -- the invention should be  
18 interpreted. That's very clear from the claims.

19           Q. Does it mean a PDU, a protocol data unit can  
20 be bigger than that service data unit, or SDU, that goes  
21 into it?

22           A. Oh, yes, sir. The -- you add headers, so it  
23 definitely can be bigger.

24           Q. Is that what would happen if you had a  
25 one-to-one segmentation?

1 A. Yes, sir.

2 Q. Okay. Lastly, on the source code, do you  
3 recall during Dr. Gibson's testimony him going through  
4 the rules and the standard? --

5 A. Yes, sir.

6 Q. -- about window shifting at the receiver. Do  
7 you remember that?

8 A. I do.

9 Q. And did you disagree with his conclusions at  
10 all about how windows shift at the receiver according to  
11 the rules in the standard?

12 A. No, sir, I don't remember having any  
13 disagreement with him about that.

14 Q. I mean, the -- the accused devices apply the  
15 rules, don't they?

16 A. Oh, yes, sir.

17 Q. Okay. Have you also seen and shown the jury  
18 today technical documentation for the products  
19 themselves that show how they implement those rules?

20 A. Yes, sir.

21 Q. That was the Intel Kedron data sheet we saw,  
22 wasn't it?

23 A. It was.

24 Q. Now, have you seen source code corresponding  
25 to all this?

1 A. Yes, sir, I have.

2 Q. Have you seen it for the accused devices?

3 A. Yes, sir, I have.

4 Q. And Mr. Van Nest said, well, you haven't shown  
5 any source code. Do you have source code available to  
6 look at and introduce that corresponds to what you saw  
7 and did as far as the receiver window goes and how it  
8 computes?

9 A. Yes, sir.

10 Q. Okay. I'm going to hand you PX 207A.

11 Is that source code that you reviewed in  
12 connection with your engagement?

13 A. Yes, sir, it is.

14 Q. For who is it -- for which -- for which  
15 product?

16 A. This is for the Atherion products -- Atheros  
17 products, sorry. Atherion is a different company.

18 Q. Does that source code correspond with the  
19 window-shifting that occurs in the cases identified by  
20 Dr. Gibson?

21 A. Yes, sir. This is the code for Atheros  
22 manipulating the window of its scoreboard.

23 Q. Okay. Are there computations in there?

24 A. Yes, sir.

25 Q. Are there commands in there?

1 A. Yes, sir.

2 MR. STEVENSON: Nothing further.

3 Thank you, Dr. Gibson -- Dr. Nettles.

4 THE COURT: All right. Any further  
5 recross?

6 MR. VAN NEST: Just one, Your Honor.

7 RECROSS-EXAMINATION

8 BY MR. VAN NEST:

9 Q. Dr. Nettles, the source code you just referred  
10 to, all that does is shift the window when a packet  
11 comes in that's outside the window, right?

12 A. No, sir, that's not correct.

13 Q. It's the window-shifting algorithm we've  
14 looked at in the standard, right, that corresponds to  
15 that?

16 A. No, sir. Actually this includes the  
17 window-shifting because of getting an implicit BlockAck  
18 and because of getting an explicit BlockAck; both of  
19 those.

20 Q. And as we established last week, an 802.11  
21 receiver will take a packet in any order, inside or  
22 outside the window, at any time, right?

23 A. On, yes, sir, and this code shows that.

24 Q. Thank you.

25 MR. VAN NEST: I have nothing further,



1 Your Honor.

2 THE COURT: Thank you.

3 Anything further?

4 MR. STEVENSON: Nothing further.

5 THE COURT: All right. If the jury will  
6 pass down their questions for this witness, please.

7 (Pause in proceedings.)

8 THE COURT: All right. We are going to  
9 take about a five-minute break and I'll visit with the  
10 attorneys about these questions and we'll come back.

11 Please remember my instructions.

12 Be in recess.

13 COURT SECURITY OFFICER: All rise for the  
14 jury.

15 (Jury out.)

16 THE COURT: Please be seated.

17 All right. The first question is:

18 Regarding the '223 patents, are the terms high MAC and  
19 low MAC in a standard? Would all of the products in  
20 question be set up that way?

21 Does the Plaintiff have any objection to  
22 the question?

23 MR. STEVENSON: No objection.

24 THE COURT: Defendants?

25 MR. VAN NEST: I'm not sure it has

1 anything to do with the issues in the case, Your Honor,  
2 but I don't have any objection to it.

3 THE COURT: All right. Very well.

4 And the next question is: With regard to  
5 the '568 patent service type identifier and traffic  
6 identifier, are they the same?

7 Any objection to that question?

8 MR. STEVENSON: No objection.

9 THE COURT: Any objection?

10 MR. VAN NEST: Could you read the  
11 question again, Your Honor?

12 THE COURT: With regard to the '568  
13 patent service type identifier and traffic identifier,  
14 are they the same?

15 MR. VAN NEST: I don't have objection to  
16 that.

17 THE COURT: All right. Next is: Why is  
18 there a chart for identifying -- I believe it says --  
19 yeah, TID -- identifying TID value if all types can fall  
20 anywhere?

21 MR. STEVENSON: No objection.

22 MR. VAN NEST: No objection, Your Honor.

23 THE COURT: And next one: Prior art. So  
24 patents are not necessary, question mark? Without  
25 patents, who owns the rights?

1                   MR. STEVENSON: I think that calls for  
2 speculation on the part of the witness, and it's  
3 probably irrelevant.

4                   MR. VAN NEST: I don't think so, Your  
5 Honor. We went over that in cross, and I think it's  
6 directly pertinent.

7                   THE COURT: All right. I'll overrule the  
8 objection, and the witness can answer.

9                   Can you answer that question?

10                  THE WITNESS: Yes, Your Honor. I think  
11 that the context was -- in the context of prior art,  
12 making it clear that patents -- you didn't have to use  
13 only patents as prior art. It's not about patents in  
14 general.

15                  Is that your understanding?

16                  THE COURT: I think that's the first part  
17 of the question, and then they ask the question:  
18 Without patents, who owns the rights?

19                  THE WITNESS: I think I'm not really  
20 qualified to answer that question.

21                  THE COURT: Okay. I think I'll sustain  
22 the objection as to that second part because I think  
23 that is -- gets into something that's not appropriate.

24                  So okay.

25                  MR. VAN NEST: Your Honor, we have one

1 matter I'd like to approach on before the jury comes  
2 back in.

3 THE COURT: All right.

4 (Bench conference.)

5 MR. VAN NEST: We'd like to request the  
6 right to a very brief surrebuttal on this source code  
7 issue that he testified about. He did not have the  
8 source code in his opening testimony at all. We didn't  
9 raise -- it was raised by him on the cross of Gibson.  
10 We haven't had a chance to -- to analyze  
11 it carefully, but we have Duncan Kitchin here, who  
12 understands the code and wrote the code. I can  
13 represent to the Court that what they have said in the  
14 evidence is absolutely flat wrong, and I don't want the  
15 jury to have a misimpression.

16 So we would request at this time, or  
17 whenever Your Honor wants it, a very brief surrebuttal  
18 from Mr. Kitchin just on this issue of code drivers on  
19 the '223 as to where the header goes on and when the  
20 timer starts. And it will be very brief.

21 THE COURT: Response?

22 MR. STEVENSON: Your Honor, I object to  
23 that, because they brought Mr. Kitchin here. They knew  
24 our theory. It was expressed in the direct examination.

25 Why didn't Mr. Kitchin go through the

1 code and say: They're wrong about this?

2 All they did is, they asked him very  
3 generally, and in the demonstrative, if it was wrong,  
4 that was the chance to do it. And I think a surrebuttal  
5 coming on now is inappropriate because we -- we didn't  
6 surprise them with something. We responded to their  
7 layer diagram, which was incorrect.

8 MR. VAN NEST: He's changed his  
9 testimony. In his direct, he said the logical link  
10 layer starts here, and then the MAC layer starts below.

11 He has now gotten up and looked at some  
12 code and misinterpreted it or misrepresented it and put  
13 the MAC layer above.

14 That's not something that was in his  
15 report. That's not something that was in his direct.  
16 He's changed his testimony, and we ought to have a right  
17 to rebut it with someone that knows what's in that code.

18 MR. AROVAS: If I can add something, the  
19 direct -- because I did a lot of these witnesses -- the  
20 direct of Nettles had a very standard diagram of the  
21 different layers. Mr. Kitchen responded to that.

22 That was the opinion where the timer  
23 started, and the standard -- it's a standardized,  
24 actually, protocol, okay?

25 What we saw here with the code, it's a

1 suggestion that -- which is directly contrary to what  
2 happened on the direct -- was that actually the Intel  
3 products don't follow that standardized protocol, which  
4 was the only layered structure that was shown by  
5 Nettles.

6 Now, what they did is, they looked at the  
7 code and said: Look at this. Doesn't this work  
8 differently? You actually have MAC/LLC as opposed to  
9 LLC/MAC, which was the testimony from Nettles on direct.

10 So all we would do with Kitchen is say:  
11 Okay. We want to just deal with the structure. Is the  
12 code using this structure from the standardized --

13 THE COURT: All right. I'll allow brief  
14 surrebuttal.

15 MR. VAN NEST: Thank you, Your Honor.

16 (Bench conference concluded.)

17 THE COURT: All right. Bring the jury  
18 in.

19 COURT SECURITY OFFICER: All rise.

20 (Jury in.)

21 THE COURT: All right. Please be seated.

22 All right, Dr. Nettles. The jury has a  
23 few questions for you.

24 First, regarding the '223 patent, are the  
25 terms high MAC and low MAC in a standard?

1                   And then follow-up: Would all the  
2 products in question be set up that way?

3                   THE WITNESS: So, no, they're not part of  
4 the standard. That's part of how Intel implements their  
5 products. The '223 is only accused against Intel and  
6 the Defendants that use Intel chips when they use Intel  
7 chips.

8                   So the high MAC and low MAC issue really  
9 doesn't apply to the other chip makers or to the  
10 Defendants when they're using the other chips.

11                  THE COURT: All right. Thank you.

12                  Next is: With regard to the '568 patent,  
13 are service type identifier and traffic identifier the  
14 same?

15                  THE WITNESS: Well, that's my testimony.  
16 I've identified the service type identifier of the  
17 patent with the -- the TID of the product is actually  
18 the traffic identifier.

19                  So I've identified those two things to be  
20 the same, so I believe they are.

21                  THE COURT: All right. Next: Why is  
22 there a chart for identifying TID value if all types can  
23 fall anywhere?

24                  THE WITNESS: Well, my understanding is  
25 that that chart has those identifications because that's

1 what the standard is suggesting that applications and  
2 programmers use for their video or voice data; that they  
3 use those categories.

4 So it's a suggestion as to how the  
5 standard in the product should be used.

6 THE COURT: All right. Thank you.

7 All right. Any follow-up questions from  
8 the Plaintiffs' counsel?

9 MR. STEVENSON: No follow-ups, Your  
10 Honor.

11 THE COURT: Any from the Defendant?

12 MR. VAN NEST: Just one, Your Honor.

13 THE COURT: All right.

14 RECROSS-EXAMINATION

15 BY MR. VAN NEST:

16 Q. The suggestion you referred to, Dr. Nettles,  
17 is only a suggestion; it's certainly not a requirement,  
18 right?

19 A. I agree with that.

20 THE COURT: All right.

21 MR. VAN NEST: Nothing further, Your  
22 Honor.

23 THE COURT: Anything further?

24 MR. STEVENSON: Nothing further.

25 THE COURT: All right, Dr. Nettles. You



1 may step down.

2 All right. Who will Plaintiffs' next  
3 witness be?

4 MR. CAWLEY: Your Honor, the Plaintiff  
5 will rest at this time.

6 THE COURT: All right. Very well.  
7 Does Defendant have any additional  
8 witnesses to call?

9 MR. VAN NEST: We do, Your Honor.

10 THE COURT: All right.

11 MR. VAN NEST: Just one. The Defendants  
12 call -- recall to the stand Duncan Kitchin.

13 THE COURT: All right. Mr. Kitchin.

14 MR. AROVAS: Your Honor, since  
15 Mr. Kitchin is a fact witness and was sequestered, we  
16 just have him outside --

17 THE COURT: All right.

18 MR. AROVAS: -- and he'll be in here  
19 momentarily.

20 THE COURT: All right. You may have a  
21 seat.

22 You may proceed.

23 MR. AROVAS: Thank you, Your Honor.

24 DUNCAN KITCHIN, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

25 DIRECT EXAMINATION

1 BY MR. AROVAS:

2 Q. Welcome back, Mr. Kitchin.

3 A. Thank you.

4 Q. Did you have a chance to go home over the  
5 weekend?

6 A. I did.

7 Q. All right. Well, I'd like to ask you just a  
8 very few questions on a very narrow topic. And just to  
9 be clear, I'm not going to be asking you about other  
10 people's testimony. As a fact witness, you haven't been  
11 in the courtroom and haven't heard the testimony of the  
12 other witnesses; is that right?

13 A. Yes, that's correct.

14 Q. Okay. And that's because the Court has a rule  
15 for fact witnesses. That's not your choice, right?

16 A. That -- that's what I understand, yes.

17 Q. Okay. And I'm also not going to -- I'm going  
18 to just talk about one piece of source code. And I'm  
19 not going to go in and go through the other topics that  
20 you talked about in your first testimony.

21 So we're just going to stay focused on one new  
22 piece of evidence that was introduced recently in the  
23 trial, okay?

24 A. Okay.

25 MR. AROVAS: And let me put on the screen

1 what has been marked as PX 0208D, excerpt pages from  
2 Intel source code. And let me hand up a copy as well.

3 Your Honor, may I approach?

4 THE COURT: Yes, you may.

5 A. All right. Thanks.

6 Q. (By Mr. Arovas) Okay. The first thing I'd  
7 like to do, Mr. Kitchin, is if you could take a look at  
8 the source code and see if it's source code you're  
9 familiar with from the Intel products.

10 A. Sure. Sure. I'm familiar with this.

11 Q. Is this source code you're familiar with?

12 A. Yes, it is.

13 Q. Okay. And so just so we have a frame of  
14 reference, I want to make sure we know what we're  
15 talking about.

16 And when you were here last time, you  
17 testified about the architecture of the Intel products  
18 and how it had a logical link layer -- that's right over  
19 here at the top (indicating) -- a MAC layer in the  
20 middle, and a physical layer at the bottom.

21 Do you recall that?

22 A. Right. Just to be clear, the logical link  
23 layer that's shown here, that's not inside our product.  
24 The top of our product is at the top of that MAC layer  
25 that's shown there.

1 Q. Okay. Right. So the logical link layer is,  
2 in fact, not even in the Intel products, right?

3 A. That's correct.

4 Q. Okay. And so you also testified that -- just  
5 so we have background -- that when a packet would come  
6 in, it would first go through the logical link layer,  
7 then to the MAC layer, and then go down this stack?

8 A. Yes, that's correct.

9 Q. Okay. And the top, the data link layer, is  
10 right up over here (indicating), right?

11 A. Yes, that's correct. The data link layer  
12 includes the logical link layer and the MAC layer.

13 Q. Okay. And the timestamp that we talked about  
14 was initialized at the top of the MAC layer; is that  
15 right --

16 A. Yes, that's correct.

17 Q. -- in the Intel products?

18 And is that different than the top of the data  
19 link layer?

20 A. Yes. Yes. That's a different thing.

21 Q. And this structure that we're looking at, just  
22 so we understand, is that a standardized structure that  
23 applies generally?

24 A. Yes, that's correct. This -- this comes from  
25 the OSI model. It comes from the 802 specifications

1 that defines all of this.

2 Q. Okay. And so, actually, if we look right over  
3 here (indicating), you mentioned the OSI model. We have  
4 802.11 and OSI model, and we have all these different  
5 layers, 1 to 7; is that right?

6 A. That's correct.

7 Q. Okay. And that's a standardized, accepted  
8 structure for the architecture of the products?

9 A. Yes, that's correct.

10 Q. And this is actually put out by Microsoft, is  
11 that right, describing how their products will interact  
12 on that?

13 A. Microsoft uses it. I think this document is a  
14 Microsoft document. But this is a -- the OSI model is  
15 a -- is a -- is a standard that's used by every  
16 networking system.

17 Q. Okay. And so just so we know where the pieces  
18 fit together, and then I want to take a look at the  
19 source code and see how that works, where does 802.11  
20 fit in this structure?

21 A. Okay. So it actually shows it right here on  
22 the right. There's a shaded box that says 802.11.

23 Q. That's right over here (indicating)?

24 A. Yes.

25 Q. And where is the logical link control layer?

1 A. So that's the narrow box just above that.

2 Q. Okay. So that's the logical link layer. And  
3 that logical link layer corresponds with the top of the  
4 data link layer; is that right?

5 A. Yes, that's correct.

6 Q. All right. And the MAC layer is 100 percent  
7 completely below the top of the data link layer; is that  
8 right?

9 A. Yes, that's correct.

10 Q. Okay. Now, if someone were to come into court  
11 and say, actually, this logical link layer is also in  
12 the middle of that MAC layer, would that be right?

13 A. No, that's not correct. They're two separate  
14 things.

15 Q. Okay. And would we see that in the Intel code  
16 as well?

17 A. That the LC isn't there?

18 Q. Yes.

19 A. Yes. Yes. The Intel code is only about the  
20 MAC functionality. That's the -- that's the part of the  
21 function that's implemented there.

22 Q. Okay. So let's take a look at the Intel code,  
23 and I'm going to put it on the screen. And the first  
24 thing I'm going to do, just so we know what we're  
25 looking at, is show you the first page of the exhibit

1 that was used here in court.

2 And if you can tell us what we're looking at  
3 up at the top, the header. If it's not big enough, I  
4 can make it a little bigger for you.

5 A. That's okay.

6 So this is a function that's called -- this is  
7 one of the first pieces of code that runs when a new  
8 packet comes into the system, into the MAC.

9 So this is after Microsoft Windows gives the  
10 MAC a packet to be transmitted. It gives it a bundle of  
11 information.

12 Q. Okay. So this is a function, so this is a  
13 section of code that will execute when that packet comes  
14 in?

15 A. That's correct.

16 Q. And is this all in the MAC layer?

17 A. Yes, it is.

18 Q. Is this in the logical link layer?

19 A. No.

20 Q. Okay. So now let's step through the lines of  
21 code, and what I'd first like to look at is Lines 867  
22 and 868, and I want to make sure we're very careful so  
23 everybody understands how the product really works.  
24 Make it a little bit bigger.

25 So we see two lines, 867 and 868. And can you

1 tell us what's going on in those lines of code?

2 A. So what it's doing here is, it's recording  
3 what the current time is. It's marking a timestamp.

4 So this -- you see at 867, it says  
5 `ndisGetCurrentSystemTime`. That's basically a call to  
6 Windows to say tell me what the time is. And it's  
7 putting that information into this thing, `pPacketInfo`,  
8 and there's a little arrow `liTimeStamp`.

9 Q. Okay. And is that where the timestamp is  
10 initialized?

11 A. Yes, that's correct.

12 Q. Okay. Now let's go a little bit further down  
13 into the code to some other lines that we saw, and I  
14 want to make sure we understand what they're doing, and  
15 then I want to get the big picture.

16 So let's go to Line 1045.

17 A. Okay.

18 Q. So that's later in the document. Much later  
19 in the document.

20 A. Uh-huh.

21 Q. And I want to look at the Line 1045 and look  
22 at -46 and -47, okay?

23 A. Okay.

24 Q. And can you tell me what's going on there?

25 A. All right. So what's happening here -- and



1 you have -- to understand what's going on here, you have  
2 to look at the way that Microsoft Windows hands data to  
3 the MAC.

4           So if you go back to the early days of Wi-Fi,  
5 as far as Windows is concerned, the only kind of network  
6 connection, the only way you connect to the Internet  
7 that it knows is a wired network. There was no such  
8 thing as wireless.

9           So you have this LLC that does the functions  
10 that it has to do; and then when it hands off the  
11 information, the results from that LLC processing, to  
12 the MAC, it hands it off in a format that was designed  
13 for a wired network. It's called Ethernet format.

14           And when we started doing Wi-Fi, we needed a  
15 different format. But Microsoft isn't going to rewrite  
16 Windows just for us. Back then Wi-Fi was this really  
17 strange, unusual thing.

18           So the very first thing we have to do at the  
19 top of the MAC is take all that information and we have  
20 to translate it into the format that we need for Wi-Fi.

21           And some of this information, like the LLC  
22 header, is generated by Windows; but they put it in this  
23 data structure in the wrong place, because it's in the  
24 right place for a wired network. So we had to shuffle  
25 it around.

1           So that's what this is doing. It's taking  
2   that information, the LLC output that comes from the LLC  
3   function, and copying it from the bunch of data that  
4   Windows gave us into the right place so that we can send  
5   it out.

6           Q.    Okay. So if we -- just to understand where  
7   all of this is happening, so is that code saying that  
8   this logical link layer is actually in the middle and  
9   that there is an upper MAC and a lower MAC with a  
10  logical link layer in between?

11          A.    No, that's not right.

12          Q.    Okay. So is this header information that's  
13  coming from the logical link layer at the top, has it  
14  already been sent to the MAC and the MAC is just  
15  reformatting that information?

16          A.    Right. So it's -- the logical link layer has  
17  done the functions it has to do and calculated its  
18  results. It turns it over to this LLC header, and it  
19  hands it to the MAC in a format that was designed for a  
20  wired network.

21                The first thing the MAC has to do is do a  
22  translation from wired format to wireless format before  
23  it can do anything else.

24          Q.    Okay. So when we go back to the code and we  
25  try to understand what's going on in these lines over

1 here, is that the MAC layer, or is that the logical link  
2 layer?

3 A. This is the MAC layer. This is the MAC layer  
4 translating that information that was given to it into a  
5 wireless format.

6 Q. And so all of this code and all of these  
7 operations are 100 percent in the MAC layer?

8 A. Yes, that's correct.

9 Q. And so let me show you a diagram that was  
10 created. It's actually a modification of something you  
11 created in your direct testimony.

12 And what was done here, just so -- I know you  
13 weren't in the courtroom -- a piece of white tape was  
14 put over where you had the logical link layer and the  
15 MAC layer, and one of the witnesses drew in MAC layer  
16 high LLC layer, MAC layer low, putting the LLC layer in  
17 the beginning.

18 Is that in any way a correct description of  
19 the architecture or operation of the Intel chips or the  
20 Intel software?

21 A. No, that's not correct.

22 Q. And if you correctly read the software, can  
23 you tell from the software that the logical link layer  
24 is, in fact, not at all in the middle of the MAC layer?

25 A. Yes. Yes, we can.

1 Q. So where does the logical link layer really  
2 go?

3 A. It goes above the MAC.

4 Q. So this is wrong?

5 A. Yes, that's correct.

6 Q. And this logical link layer actually goes  
7 above it?

8 A. Yes, that's correct.

9 Q. There (drawing).

10 So if we go back to how the product actually  
11 works, which is very important to get right in this  
12 case, because the test is comparing patents to a  
13 product, I want to make sure that we focus on the key  
14 feature.

15 Where in the Intel products is the timestamp  
16 initialized?

17 A. It's set -- it's one of the first things that  
18 happens at the top of a MAC layer.

19 Q. And that's up here (indicating)?

20 A. That's correct.

21 Q. And is that at the start of the data link  
22 layer?

23 A. No. The data link layer is at the top of the  
24 LLC.

25 Q. And let's look at that standard that we saw

1 earlier for the 802.11 protocol, this standardized  
2 architecture.

3 Is Intel trying to do anything different than  
4 the standard architecture?

5 A. No.

6 Q. Thank you.

7 MR. AROVAS: No further questions.

8 THE COURT: All right. Cross-exam.

9 CROSS-EXAMINATION

10 BY MR. STEVENSON:

11 Q. Mr. Kitchin, I thought I heard you say that  
12 what you're calling the LLC isn't in the Intel code,  
13 that it's Microsoft code.

14 Did I hear that correctly?

15 A. Yes, that's correct.

16 Q. Is that -- also referred to the NDIS?

17 A. It's related to that. I don't know for sure  
18 exactly what the structure of the -- that Windows,  
19 Microsoft uses in terms of its operations. What I know  
20 is what the interface is, the API that comes from --  
21 from Microsoft to the MAC.

22 Q. That's called the N-D-I-S, right?

23 A. It's part of the NDIS, yes, that's correct.

24 Q. And you didn't review any of that Microsoft  
25 code before coming in here to testify, did you?

1 A. No, I didn't.

2 Q. And isn't it true what sits right above the  
3 MAC is the NDIS?

4 A. That's the interface we get, yes, that's  
5 correct.

6 Q. And the NDIS is not a logical link layer, is  
7 it?

8 A. The logical link layer is contained in that  
9 code.

10 Q. The NDIS is not a logical link layer; it's  
11 just an API, correct?

12 A. From our point of view, sure. The LLC is the  
13 other side of this NDIS API.

14 Q. Were you -- were you deposed on this topic?

15 A. Yes, I was.

16 MR. STEVENSON: Mr. Diaz, would you play  
17 Page 21, Line 10 through 22, Line 1, of Mr. Kitchin's  
18 deposition.

19 (Video playing.)

20 QUESTION: What is NDIS?

21 ANSWER: It's a Microsoft term. It  
22 relates to the way the operating system talks to -- to  
23 network cards.

24 QUESTION: And are you familiar with the  
25 OSI model?

1                   ANSWER: Yes, I'm familiar with the OSI  
2 model.

3                   QUESTION: The NDIS sits above the MAC  
4 layer, right?

5                   ANSWER: NDIS is an interface to -- it  
6 doesn't really exactly correspond to anything in the OSI  
7 layer. It's, I think, approximately above the MAC  
8 layer. It's about -- right. It's the interface to the  
9 MAC.

10                  QUESTION: Well, it corresponds to the  
11 LLC, doesn't it?

12                  ANSWER: No, that's not correct. NDIS  
13 is, to my understanding -- I mean, this speaks to, you  
14 know, the way that Microsoft has defined it, but it's --  
15 I believe it's correct to describe it as an API that  
16 interfaces to the MAC.

17                  MR. STEVENSON: Nothing further.

18                  THE COURT: All right. Thank you.

19                  Any further redirect?

20                  MR. AROVAS: No, Your Honor.

21                  THE COURT: If the jury would pass down  
22 any questions for this witness, please.

23                  (Pause in proceedings.)

24                  THE COURT: All right. We'll take about  
25 a five-minute break.

1 COURT SECURITY OFFICER: All rise for the  
2 jury.

3 (Jury out.)

4 THE COURT: Please be seated.

5 All right. The first question for the  
6 witness is: The logical link layer and the MAC layer  
7 are within the data link layer, aren't they?

8 I'll add the question mark.

9 Defendant have any objection to that?

10 MR. VAN NEST: No. No, Your Honor.

11 THE COURT: Plaintiff have any objection?

12 MR. STEVENSON: No objection.

13 THE COURT: The next question: In the  
14 OSI reference model, the description below the picture  
15 states the MAC is a sublayer of the data link layer.

16 Does the 802.11n standard state the timer  
17 starts in a sublayer in the data link layer -- or in the  
18 data link layer?

19 MR. STEVENSON: No objection.

20 MR. VAN NEST: No objection, Your Honor.

21 THE COURT: All right. You may bring the  
22 jury in.

23 COURT SECURITY OFFICER: All rise.

24 Judge --

25 THE COURT: Okay.



1 (Pause in proceedings.)

2 (Jury in.)

3 THE COURT: Please be seated.

4 All right, Mr. Kitchin. The first  
5 question is: Are the logical link layer and the MAC  
6 layer within the data link layer?

7 THE WITNESS: Yes, that's correct.

8 So the data link layer consists of two  
9 sublayers, as they're referred to. The upper one is the  
10 logical link layer, and the lower one is the MAC. So  
11 those two things are entirely within the data link  
12 layer.

13 THE COURT: All right. The next  
14 question: In the OSI reference model, the description  
15 below the picture states the MAC is a sublayer of the  
16 data link layer. Does the 802.11n standard state the  
17 timer starts in a sublayer of the data link layer?

18 THE WITNESS: So I don't know if it  
19 actually uses that language in the 802.11n spec itself.

20 What it does say is, it specifies that  
21 the scope of the 802.11n standard is the MAC, plus a  
22 physical layer.

23 And if you go to -- I think it's the 802  
24 document, which is the kind of overall standard that  
25 tells you where the others fit, it then explains that

1 the MAC is a sublayer of the data link layer. And it  
2 has a picture very similar to that one we were looking  
3 at.

4 So I don't know whether it actually says  
5 it's in a sublayer of the data link layer in the 11n  
6 spec without looking, but it says quite clearly it's  
7 within the MAC.

8 And then you have this other document  
9 802, which describes those sublayers and uses that  
10 language. There may be some repetition of that, like in  
11 the introductory section in the 11n standard, but the  
12 primary source of that is the overall 802 document.

13 THE COURT: All right. Thank you.

14 Any follow-up questions from the  
15 Defendant?

16 MR. AROVAS: I have one, Your Honor.

17 THE COURT: All right. You may proceed.

18 REDIRECT EXAMINATION

19 BY MR. AROVAS:

20 Q. So, Mr. Kitchin, I just have one question for  
21 you, and it's a question on the operation of the  
22 product.

23 If a question we had to answer in this case  
24 were, does the timestamp in the Intel -- does the  
25 timestamp in the Intel products initialize when the data

1 unit is received by the data link layer, does that  
2 happen or not?

3 A. No, it doesn't. It happens at the top of the  
4 MAC.

5 Q. And so if the question is, does the timestamp  
6 get initialized when the data unit is received by the  
7 data link layer, the answer to that would be no, that's  
8 incorrect?

9 A. That's correct. That is incorrect.

10 Q. Thank you.

11 MR. AROVAS: No further questions.

12 THE COURT: All right. Thank you.

13 Follow-up questions by Plaintiffs'  
14 counsel?

15 MR. STEVENSON: Nothing further.

16 THE COURT: All right. Thank you. You  
17 may step down.

18 All right. Does Defendant have any other  
19 witnesses?

20 MR. VAN NEST: No, we do not, Your Honor.

21 THE COURT: Plaintiff have any further  
22 witnesses?

23 MR. CAWLEY: No, Your Honor.

24 THE COURT: All right. Both sides close,  
25 finally close?

1                   MR. VAN NEST: Again, Your Honor, subject  
2 to getting -- making sure we have our demonstratives  
3 marked and our exhibits in, Defendants close.

4                   MR. CAWLEY: That's also for the  
5 Plaintiffs, Your Honor.

6                   THE COURT: All right. Very well.  
7 All right. Thank you. You may be  
8 seated.

9                   All right, Ladies and Gentleman of the  
10 Jury, we started a week ago Monday with Voir Dire  
11 Examination. You've heard -- then heard opening  
12 statements. You've heard -- now heard all of the  
13 testimony.

14                  We're about to adjourn for the day. When  
15 you come back tomorrow morning, you will hear the  
16 Court's charge, and then you will hear closing argument  
17 by counsel for both parties, and then and only then will  
18 be the first time that you will begin your  
19 deliberations.

20                  So I anticipate that will take up most of  
21 the morning, so you should get the case about noon  
22 tomorrow, and we'll have lunch, and you can begin your  
23 deliberations.

24                  You've been an excellent jury. You've  
25 paid questions -- paid close attention. You've asked

1 very good questions. I commend you on your hard work  
2 over the last week.

3 So please follow all of my instructions.  
4 I know you have been. Please continue to do so this  
5 evening. Don't discuss the case amongst yourselves or  
6 with anyone else. Don't make any independent  
7 investigation or inquiry.

8 Have a good night's sleep, and we'll see  
9 you back here in the morning at 9:00 o'clock ready to  
10 go.

11 The jury is excused.

12 COURT SECURITY OFFICER: All rise.

13 (Jury out.)

14 THE COURT: All right. Please be seated.

15 All right. Does Plaintiff have any  
16 objections to the Court's charge?

17 MR. VAN NEST: Excuse me, Your Honor.

18 Could -- some of us would like to ask for  
19 Your Honor to excuse us so we may begin preparing for  
20 closing arguments.

21 THE COURT: You're not interested in the  
22 objections to the Court's charge?

23 MR. VAN NEST: I am. I am, I assure you,  
24 but we have so much to do.

25 THE COURT: All right. That will be

1 fine.

2 MR. VAN NEST: If we may be excused.

3 THE COURT: Anyone that would like to  
4 leave may do so quickly and quietly.

5 MR. VAN NEST: Thank you, Your Honor.

6 Well, Your Honor, let me do one other  
7 thing.

8 THE COURT: Do you have any objection to  
9 me leaving and --

10 [Laughter]

11 THE COURT: Go ahead, Counsel.

12 MR. VAN NEST: May we have permission --  
13 we'd like to make our own JMOL motions. Also, as  
14 Plaintiffs did, we will be filing them tonight. Would  
15 they be timely if we did that?

16 THE COURT: By 7:00 p.m. tonight.

17 MR. VAN NEST: Filed by 7:00 p.m.  
18 tonight.

19 THE COURT: Uh-huh.

20 MR. VAN NEST: Thank you, Your Honor.

21 THE COURT: All right, Mr. Campbell.

22 MR. CAMPBELL: I guess just to follow up  
23 on that point, to preserve any rights we need to, we  
24 will renew our JMOL motions that we've already filed,  
25 now that all the evidence is in.

1 THE COURT: By 7:00 p.m. tonight.

2 MR. CAMPBELL: Do we need to file -- it  
3 would be the same thing. You want us to file it again?

4 THE COURT: Not necessary.

5 MR. CAMPBELL: Okay. Thank you, Your  
6 Honor.

7 On the charge, just a couple of things.  
8 I'm not even sure it's necessary, and I don't want to  
9 reargue it; but, of course, the claim construction,  
10 anything that the Court did not adopt that we proposed,  
11 we want to preserve any arguments -- and the briefing  
12 and the arguments that were made, for appeals purposes.

13 THE COURT: All right.

14 MR. CAMPBELL: So I guess we have to  
15 object for that basis.

16 THE COURT: All right. So noted. That  
17 objection is overruled.

18 MR. CAMPBELL: Understood.

19 On the verdict form, a couple of  
20 things -- just one thing. The chart on Page 3, it's for  
21 Question 2.

22 THE COURT: Okay.

23 MR. CAMPBELL: The case was pared down,  
24 and on the chart on Page 2 on the '223 patent, Claim 14  
25 should be removed.

1 THE COURT: All right.

2 MR. CAMPBELL: And on the '568 patent,  
3 Claim 5 should be removed.

4 THE COURT: All right.

5 MR. CAMPBELL: That's just for  
6 Question 2.

7 Question 1 was correct.

8 THE COURT: All right. Very well.

9 MR. CAMPBELL: And then the final  
10 objection is, the Plaintiffs offered a construction --  
11 or -- sorry -- an instruction that the infringers profit  
12 margin is not a ceiling on damages, based that on a  
13 recent case out of the Federal Circuit, Douglas  
14 Dynamics, taking the language straight from the opinion  
15 there. The Court did not adopt that instruction.

16 THE COURT: Where would that have fallen?

17 MR. CAMPBELL: That was in Final  
18 Instruction No. 33 in the proposal.

19 THE COURT: All right. Go ahead and --  
20 where in the existing charge would this be inserted?

21 MR. CAMPBELL: Oh, where would it -- it  
22 would be part of damages. So it could probably go  
23 within the damages instruction with 8.3 or immediately  
24 after 8.3.

25 THE COURT: All right. And what is the



1 instruction that you're requesting?

2 MR. CAMPBELL: The instruction is: An  
3 infringer's net profit margin is not the ceiling by  
4 which a reasonable royalty is capped. The infringer's  
5 selling price can be raised, if necessary, to  
6 accommodate a higher royalty rate. Requiring the  
7 infringer to do so may be the only way to adequately  
8 compensate the patentee for the use of its technology.

9 THE COURT: Okay. Response?

10 MR. DE VRIES: We object to that  
11 instruction, Your Honor. It's an incomplete statement  
12 of the law.

13 At a minimum, Rite-Hite -- the Fifth  
14 Circuit's decision in Rite-Hite makes clear that it is  
15 only in very unusual circumstances that the reasonable  
16 royalty would exceed the profit margin of the alleged  
17 infringer; and, frankly, only in a circumstance where  
18 there is evidence, which there is not here, that the  
19 accused infringer had an expectation to receive a profit  
20 higher than they did here.

21 The only evidence we have is Ericsson  
22 actually getting out of the Wi-Fi market, finding it to  
23 be unprofitable.

24 So we object to that instruction. If the  
25 Court is inclined to adopt that, we would ask for a

1 brief opportunity to provide an alternative instruction.

2 MR. CAMPBELL: Your Honor, if I may  
3 respond?

4 THE COURT: Uh-huh.

5 MR. CAMPBELL: The Rite-Hite opinion that  
6 they're citing to, that's the dissent. The Rite-Hite  
7 opinion stands for the opposite. It's the -- it's an en  
8 banc opinion from the Federal Circuit, and their  
9 citation here objecting to this instruction is part of  
10 the dissent.

11 MR. DE VRIES: The point, Your Honor, is  
12 that the discussion in Rite-Hite, which does recognize  
13 the rule that is being articulated here, which is that  
14 in certain circumstances, the -- the reasonable royalty  
15 can exceed the profit margin, does not -- does not mean  
16 that that is right in every circumstance; and there is  
17 discussion in, my understanding, the majority opinion in  
18 the case to that effect.

19 And as I said, if Your Honor's inclined  
20 to do that, I would request an opportunity to provide,  
21 within the next matter of minutes, an alternative  
22 instruction.

23 THE COURT: Okay. I'll take that under  
24 advisement. You can submit your instruction, and then  
25 it will either be in there in the morning or not. If

1 it's not in there, I overrule your objection. If it is,  
2 I grant it.

3 MR. CAMPBELL: Okay. The en banc opinion  
4 does make it clear, Your Honor.

5 THE COURT: All right. Please provide  
6 that opinion to my staff, if you would.

7 MR. CAMPBELL: I gladly will do so.

8 Do we have three copies of that?

9 We'll provide copies, Your Honor.

10 That is all from the Plaintiffs.

11 THE COURT: All right. Do Defendants  
12 have any objections?

13 MS. PIEPMEIER: Yes, Your Honor. This is  
14 Sarah Piepmeier for Defendants.

15 First, we have -- just as counsel for  
16 Plaintiffs noted, on Section 4.2, claim interpretation,  
17 we don't have an objection; but we obviously note that  
18 this is subject to and preserving all of our points and  
19 positions raised at Markman and objections and so forth.

20 THE COURT: All right. So noted, and  
21 objections are overruled.

22 MS. PIEPMEIER: On Section 5.1, literal  
23 infringement, I have one very, very minor correction,  
24 which is within the third line. It says: Infringe the  
25 parent, and I believe that's supposed to be patent.

1 THE COURT: All right. Thank you.

2 That's on Line 3. Last word of that sentence should be

3 "patent" instead of "parent."

4 MS. PIEPMEIER: That's correct, Your

5 Honor.

6 THE COURT: All right.

7 MS. PIEPMEIER: In addition, on that same

8 section, I would note a few things.

9 We submitted a proposal, which was

10 Defendants' proposal for No. 13, jury instruction, and

11 that proposal did not include a reference to the

12 doctrine of equivalents, which we believe should be

13 removed here, because Plaintiff agreed not to make any

14 argument on doctrine of equivalents.

15 And the reference is on Page 13. In the

16 second paragraph up, it says: In that patent claim or

17 its equivalent. And we would request that that -- those

18 three words be struck.

19 THE COURT: Response?

20 MR. CAMPBELL: No objection, Your Honor.

21 THE COURT: All right. That objection is

22 sustained.

23 MS. PIEPMEIER: In addition, Your Honor,

24 I would note just a couple of other things.

25 Our Proposed Instruction No. 13 separated

1 out method and system claims, and that is because, as  
2 Your Honor knows, the proof required for each of those  
3 is slightly different.

4 And in our version, which we would --  
5 obviously, which we submitted and requested would be  
6 adopted, we believe that it would be appropriate to  
7 instruct the jury that for the method claims that are at  
8 issue here, which is Claim 1 of the '625, Claims 1 and 2  
9 of the '435 and Claim 1 of the '215, that there should  
10 be an instruction that each step is performed in the  
11 United States by one person or by someone else who is  
12 acting under the direction and control of that person.

13 THE COURT: Okay.

14 MS. PIEPMEIER: That was included in our  
15 proposal, and we would request that it be adopted.

16 THE COURT: All right. Response?

17 MR. CAMPBELL: Your Honor, I think your  
18 proposed construction -- or proposed instructions make  
19 clear how the jury is supposed to compare the claims to  
20 the accused product for both system and method claims.

21 I'm not sure that there's any confusion  
22 within what the Court's instructions have or what's  
23 being proposed to be changed, but I think it's proper  
24 the way that it is.

25 THE COURT: All right. Objection is

1 overruled.

2 MS. PIEPMEIER: One final objection, Your  
3 Honor, on this instruction. We would -- our original  
4 proposal did not include the language regarding a patent  
5 being infringed if -- if the product is reasonably  
6 capable of infringing. We believe that that instruction  
7 is -- would not be proper, especially for the method  
8 claims, but for both the method and the system claims.

9 THE COURT: And where is that?

10 MS. PIEPMEIER: That is in the first full  
11 paragraph on Page 13, an accused system or product  
12 directly infringes a claim if it is reasonably capable  
13 of satisfying the claim elements even though it may also  
14 be capable of non-infringing modes of operation. And  
15 then it continues for that paragraph.

16 THE COURT: Response?

17 MR. CAMPBELL: Your Honor, that's an  
18 accurate statement of law under the Federal Circuit law.

19 We can pull the law if Your Honor wants.  
20 I believe that's the Spalding case, but that's an  
21 accurate statement of law and should be part of the  
22 instructions.

23 THE COURT: All right. Objection is  
24 overruled.

25 Response -- or next?

1 MS. PIEPMEIER: Thank you, Your Honor.

2 On No. 6, indirect infringement, inducing  
3 patent infringement. This was originally submitted, I  
4 believe, as agreed; but Defendants would like to raise  
5 an objection because there's been a failure of proof on  
6 indirect infringement, and we believe it would be  
7 improper to put that issue before the jury.

8 THE COURT: Okay. What is your  
9 objection, specifically?

10 MS. PIEPMEIER: Specifically, the only  
11 evidence that has come into the record at all that could  
12 potentially be related to inducing is the date of  
13 notice; and also a few lines from Dr. Nettles that are  
14 extremely cursory, which I can read if Your Honor would  
15 like to hear them, but do not set forth any of the  
16 elements that are required to demonstrate induced  
17 infringement.

18 And there has been -- because there has  
19 been such a failure of proof on that issue, we believe  
20 it would be improper to include an instruction on it.

21 THE COURT: Okay. Response?

22 MR. CAMPBELL: Your Honor, I disagree.  
23 There's been plenty of evidence for a jury to find  
24 inducement. There's been a stipulation on the notice  
25 dates of when the Defendants knew of these patents.

1                   There's been testimony from Mr. Bone on  
2     advertising of these products as complying with the  
3     standard and how to use these products to support Wi-Fi.

4                   There's more than enough evidence in the  
5     record to support a jury verdict of inducement.

6                   THE COURT: All right. I'm going to take  
7     that one under advisement. If it's not in there, I  
8     sustain the objection; if it is in there, I overrule the  
9     objection.

10                  MS. PIEPMEIER: Thank you, Your Honor.

11                  May I add one more thing on that? If  
12     Your Honor is inclined to keep the instruction, we would  
13     request that Intel not be included because that was not  
14     within the scope of Dr. Nettles' report or presumably  
15     his testimony since I understand that to be based on his  
16     report.

17                  THE COURT: Response?

18                  MR. CAMPBELL: Your Honor, again, I think  
19     there's plenty of evidence in the record that Intel  
20     was -- was provided notice, as well as that they intend  
21     people to use these to connect to Wi-Fi. They advertise  
22     them in that way. They know that that's the way that  
23     this is going to occur.

24                  THE COURT: All right. That objection  
25     will be overruled, if I keep it in.



1 MS. PIEPMEIER: Thank you, Your Honor.

2 I have just two more points on the  
3 liability issues. On No. 7, invalidity, we are fine  
4 with the charge as stated, but would request that four  
5 words be removed from the third sentence in order to  
6 take it more closely to the VirnetX instruction that we  
7 believe is -- is proper.

8 And the sentence that I'm referring to  
9 under No. 7 is: Evidence of material prior art which is  
10 not cumulative of prior art cited to or by the PTO may  
11 be more probative -- and then it continues.

12 We would respectfully request that the  
13 words "cumulative of prior art" be struck, as we don't  
14 think it's relevant here. We think it could be  
15 confusing to the jury, and it's prejudicial.

16 THE COURT: All right. Objection is  
17 overruled.

18 MS. PIEPMEIER: Finally, Your Honor, on  
19 7.2, top of Page 21, we're fine with the instruction  
20 generally; but we would, respectfully, request that the  
21 first two paragraphs on Page 21, which begin "a printed  
22 publication must be reasonably accessible to those  
23 members of the public who would be interested in its  
24 contents," and then continues for that paragraph and the  
25 following paragraph, we would request that those be

1 removed because the issue of public availability doesn't  
2 appear to be questioned; and that may simply confuse the  
3 jury.

4 THE COURT: Response?

5 MR. CAMPBELL: It's an accurate statement  
6 of law, Your Honor. That's what a printed publication  
7 must be in order for it to be prior art. I think the  
8 jury needs to be instructed on what it takes for a  
9 printed publication to be prior art.

10 There was even a publication shown to the  
11 jury by Dr. Heegard where Mr. Stevenson made the point  
12 that it was not a printed publication. It was not  
13 reasonably accessible to members of the public who would  
14 be interested in its contents. The jury needs to  
15 understand what it takes to be a printed publication.

16 THE COURT: All right. Objection is  
17 overruled.

18 MS. PIEPMEIER: Your Honor, I'm sorry.

19 May I make one more point, if I -- if I  
20 may on that?

21 We -- I understand that there was  
22 actually an agreement with counsel for Plaintiffs that  
23 they would not challenge this issue. And in reliance on  
24 that agreement, we actually withdrew deposition  
25 testimony that would have come in on this issue of

1 public availability.

2                   So in our view it would be prejudicial to  
3 put that issue back before the jury when there was an  
4 agreement among counsel to streamline the issues that  
5 went into the -- into the record.

6                   THE COURT: Response?

7                   MR. CAMPBELL: The agreement, Your Honor,  
8 was that we would not have Dr. Nettles testify that it  
9 was not publicly available. It doesn't change the law.  
10 The law is still what it is. There's still a burden to  
11 prove that it's a printed publication.

12                  THE COURT: Okay. Objection is  
13 overruled.

14                  MS. PIEPMEIER: Thank you, Your Honor.

15                  MR. DE VRIES: Your Honor, with your  
16 permission, my colleague, Ms. Piepmeier, and I have  
17 split these up. I have just a very few.

18                  THE COURT: Okay.

19                  MR. DE VRIES: Mostly in the nature of  
20 some, I think, typo or very small corrections.

21                  THE COURT: All right.

22                  MR. DE VRIES: So, Your Honor, on Page 6,  
23 contentions of the parties. The one thing that I would  
24 suggest with opposing counsel's permission and, of  
25 course, Your Honor's is at the very bottom of that page

1 we refer to the accused 802.11-compliant products, and  
2 it continues on to the next page. I wonder if it might  
3 be helpful to "n" there, so it's 802.11n.

4 THE COURT: Any objection?

5 MR. CAMPBELL: No, Your Honor.

6 THE COURT: All right. We'll add "n" to  
7 802.11 at the bottom of Page 6. Okay.

8 MR. DE VRIES: Thank you, Your Honor.

9 THE COURT: Is that all?

10 MR. DE VRIES: Skipping ahead now to Page  
11 22, there's a damages section that begins damages. And  
12 we have some concerns about the second paragraph there.

13 Again, these are in the nature of, sort  
14 of, line edits.

15 The first sentence begins, "In this case,  
16 Ericsson has sued D-Link, NETGEAR, Belkin, Acer,  
17 Gateway, Dell, and Toshiba, but it has not sued Intel."

18 And in the case, there has been a  
19 counterclaim of infringement that Ericsson has asserted  
20 against Intel, and I think that that language, the --  
21 specifically, "but it has not sued Intel," could be  
22 confusing to the jury, and we recommend deleting it.

23 THE COURT: Deleting that sentence?

24 MR. DE VRIES: No, sir. Just that  
25 language, "But it has not sued Intel."

1                   THE COURT: All right. I have no problem  
2 with that. We'll strike that last clause, "but it has  
3 not sued Intel."

4                   MR. DE VRIES: And then, Your Honor, on  
5 the very same point, at the end of the next section, we  
6 would suggest adding the following language:

7                   And Ericsson has counterclaimed against  
8 Intel for alleged infringement, period. Ericsson has  
9 not, however, sought separate damages from Intel.  
10                  We think that's a more correct  
11 description of where we're at.

12                  THE COURT: Now, where are you saying  
13 that should go?

14                  MR. DE VRIES: Sorry, Your Honor. At the  
15 very end of the next sentence. The next sentence  
16 begins, "Intel has intervened in this case to defend its  
17 chips used by some of its customer Defendants."

18                  THE COURT: Uh-huh.

19                  MR. DE VRIES: Then the language I  
20 proposed would be inserted right there.

21                  THE COURT: And give me that language  
22 again.

23                  MR. DE VRIES: Yes, sir.

24                  And Ericsson has counterclaimed against  
25 Intel for alleged infringement, period. Ericsson has

1 not, however, sought separate damages from Intel.

2 THE COURT: Response?

3 MR. CAMPBELL: Your Honor, I think that  
4 would be confusing to the jury. There's no context of  
5 what counterclaim means or why -- what that means, so a  
6 jury -- it's a legal issue of a counterclaim.

7 It's already been made clear by the  
8 Court's instruction here that Intel has intervened, and  
9 it's also been made clear that there is no need to  
10 assess damages for Intel's infringement.

11 So to add to the instruction and use the  
12 word "counterclaim" and -- I think only adds confusion  
13 to what is already a clear statement by the Court.

14 THE COURT: All right. The Court's going  
15 to deny that objection and request.

16 All right. What's next?

17 MR. DE VRIES: Thank you, Your Honor.

18 In 8.2, I think there's some -- a  
19 clarification that needs to be made to that section to  
20 make it factually accurate. And in short, let me  
21 describe it at a high level, and then I'm prepared to  
22 give Your Honor exact language.

23 We right now have a statement that  
24 Ericsson filed a complaint against the Defendants on  
25 September 14th, 2010. I understand that the facts are

1 that Ericsson filed a complaint against -- I'm sorry --  
2 D-Link, NETGEAR, Acer, and Gateway on September 14th,  
3 2010.

4 Then Ericsson filed a complaint against  
5 Dell, Toshiba, and Belkin on June 8th, 2011.

6 And, finally, Ericsson counterclaimed --  
7 and we could use the word "claimed" -- claimed for  
8 infringement against Intel on July 3rd, 2012. And I  
9 think these corrections are necessary because there's a  
10 suggestion here that that date otherwise provided,  
11 September 14th, 2010, applies to everyone.

12 THE COURT: Okay. Response?

13 MR. CAMPBELL: Well, Your Honor, if we're  
14 going to -- if we're going to suggest what dates are  
15 relevant -- there's a stipulation to Your Honor. Your  
16 Honor pushed the parties to enter into a stipulation,  
17 which they did. There's a stipulation on the date that  
18 Ericsson gave notice to the Defendants.

19 So if we're going to put dates in, the  
20 date ought to come straight from the stipulation as to  
21 when the Defendants knew of these patents. That's what  
22 we're talking about here. The dates of the complaint  
23 end up being irrelevant based on the dates of the  
24 stipulation.

25 So that would be very confusing to the

1 jury to include the dates complaints were filed, but the  
2 relevant dates are the dates of the stipulation.

3 MR. DE VRIES: Your Honor, one potential  
4 solution -- and I don't mean to speak out of turn, but  
5 in case this aids us in resolving this -- we could  
6 strike the entire paragraph.

7 THE COURT: Any objection to that,  
8 Counsel?

9 MR. CAMPBELL: No. I think that would be  
10 fine. I think what would be most helpful to the jury is  
11 to put in the stipulated dates, but striking that  
12 paragraph would also be fine.

13 THE COURT: All right. We'll strike out  
14 that paragraph.

15 What's next, Counsel?

16 MR. DE VRIES: Your Honor, in our  
17 proposed instructions, immediately following this  
18 instruction when damages began, we had a section -- an  
19 instruction, rather, that included some important  
20 limitations on damages in the indirect infringement  
21 context, specifically the rule that damages are limited  
22 to proven instances, or in some cases, categories of  
23 direct infringement on an indirect infringement claim.

24 And also in our version of the  
25 when-damages-begin section, we included an important



1 limitation on the damages for direct infringement of a  
2 method claim; namely, that damages are only available,  
3 for instance, as a direct infringement occurring in the  
4 United States.

5                   We object that these are not included;  
6 and if it's Your Honor's pleasure, I have a proposed  
7 instruction that include those issues that I could pass  
8 up to the Court.

9                   THE COURT: All right. If you would hand  
10 it up, please.

11                   All right. Response?

12                   MR. CAMPBELL: Your Honor, I haven't had  
13 a chance to read this; but if it's similar to what was  
14 proposed before, it really goes to, you know, what it  
15 takes to infringe, which the instructions already deal  
16 with quite well, as to what it takes to infringe a  
17 patent; and that damages begin once infringement begins.

18                   I think it's only confusing to break this  
19 out into direct and indirect infringement and talk about  
20 method claims and apparatus claims when the instructions  
21 already make it clear what needs to be found for  
22 infringement. We don't need to do that again in the  
23 damages section.

24                   THE COURT: All right. Response to that?

25                   MR. DE VRIES: We think that it --

1 there's a separate damages-related point, Your Honor. I  
2 think that the jury will misunderstand that if it finds  
3 even one instance of direct infringement, which,  
4 frankly, we don't believe is there; but putting that  
5 aside, that it should -- that it will believe that it  
6 should award all -- damages on all sales.

7                   That's just not the law. The law  
8 requires proof of actual instances of direct  
9 infringement, or in some circumstances, categories. We  
10 think it's necessary to have this instruction to avoid  
11 that error.

12                   THE COURT: All right. I'm going to  
13 overrule the objection. I believe it's covered by the  
14 infringement instructions.

15                   What's next?

16                   MR. DE VRIES: Your Honor, this is in the  
17 nature of making sure that we've adequately preserved  
18 our objections.

19                   For the reasonable royalty definition,  
20 Defendants had submitted a proposed instruction on  
21 reasonable royalty. We believe that our proposed  
22 instruction is more consistent with Ericsson's admitted  
23 RAND obligations.

24                   We understand that the Court has not  
25 adopted that, and we just wanted to note for the record

1 that we object to what was adopted for that reason.

2 THE COURT: All right. The objection is  
3 noted.

4 MR. DE VRIES: And then without waiving  
5 those objections, Your Honor, on Page 25 of that  
6 reasonable royalty objection, in the first full  
7 paragraph at the very bottom of that page that begins  
8 "in making your determination," I think there's a  
9 minor -- maybe perhaps a typo in the second line.

10 It says: When the Defendant infringer  
11 first infringed the patent.

12 I think perhaps that should say: When  
13 the Defendants first or when the Defendant first  
14 infringed the patent.

15 THE COURT: Yes. Okay. I'll strike the  
16 word "infringer."

17 MR. DE VRIES: I think -- just two more  
18 things, Your Honor, and then a quick note on the verdict  
19 form.

20 The first is that we submitted a proposed  
21 instruction for the entire market value rule. We  
22 recognize that Your Honor has previously ruled on  
23 related issues.

24 We do think here it's important that the  
25 jury be presented with the law that says that the entire

1 market value rule does not apply unless certain types of  
2 evidence have been -- has been shown. We don't think  
3 that's been shown here, and we would propose that the  
4 Court adopt our instruction.

5 I, again, have a copy of that, if it  
6 would please Your Honor, for me to bring it up.

7 THE COURT: All right. The objection is  
8 overruled.

9 MR. DE VRIES: Okay. And then, finally,  
10 on the instructions, Your Honor, you'll recall that  
11 during trial we handed up to the Court and also to  
12 opposing counsel a proposed limiting instruction about  
13 licenses.

14 I think this is a very important one,  
15 Your Honor. Throughout this trial, we have heard an  
16 awful lot about the licenses that the -- that Ericsson  
17 has signed with other companies.

18 I think given the way that that's been  
19 presented to the jury and the repetition with which it's  
20 been presented to the jury, it's very important that the  
21 jury be instructed that that -- that those facts are in  
22 no way relevant to the infringement determination.

23 I have more copies of what we handed up  
24 earlier, but we would ask Your Honor to please include  
25 that instruction.

1 THE COURT: All right. Response?

2 MR. CAMPBELL: Your Honor, your  
3 instructions make clear what is required for  
4 infringement. It doesn't talk about the licenses.

5 If we're going to start to bring in  
6 everything that is irrelevant, then we need an  
7 instruction that the Defendants' patents are irrelevant  
8 to this determination, even though those have come in  
9 and I'm sure a number of other things.

10 This is an accurate statement of the law,  
11 what it takes to infringe, and there's no reason to  
12 start reciting what is -- what is irrelevant in that  
13 determination.

14 THE COURT: All right. Your request is  
15 denied.

16 What's next?

17 MR. DE VRIES: So, finally, Your Honor,  
18 with respect to the final verdict form, I'd like to  
19 note, we don't have any objection to the changes that  
20 Plaintiff made with respect to the liability questions.

21 The only point that we wanted to raise --  
22 and I understand that Your Honor has likely overruled  
23 this suggestion, so I'll be brief.

24 We think that the verdict form, the final  
25 question, No. 4, needs to -- should be altered in order

1 to reflect the possibility that a -- that the jury  
2 awards a lump sum.

3 I think that there are two changes that  
4 need to be made. First, the -- at the end of the first  
5 sentence, it -- the question at the top in No. 4, it  
6 says "up to the time of trial."

7 We've had testimony from both  
8 witnesses -- damages witness in this case about lump  
9 sum, and I think that the jury's been presented with the  
10 issue of whether a lump-sum royalty is appropriate.

11 We would respectfully suggest striking  
12 out the words "up to the time of trial" in the verdict  
13 form.

14 THE COURT: All right. Objection is  
15 overruled.

16 MR. DE VRIES: And then I won't -- I  
17 won't continue, but just to preserve it for the record  
18 then, Your Honor, we think that also the sections that  
19 relate to filling out damages amounts for the -- for the  
20 Defendants should also include a lump-sum category.

21 And also, we think it would be helpful  
22 ultimately to have a running royalty line item with a  
23 rate.

24 THE COURT: All right. That request is  
25 denied.

1 MR. DE VRIES: We have one other  
2 unrelated question, but we have no other comments, Your  
3 Honor, with respect to the jury instructions or the  
4 verdict form.

5 THE COURT: Okay. Thank you.

6 All right. That concludes the -- your  
7 opportunity to object to the charge, and we'll get you a  
8 final copy first thing in the morning, so...

9 Let's see. I'm told to remind the  
10 parties to get all of your exhibits and all inclusive  
11 lists of admitted exhibits in for tomorrow. Have them  
12 in shape to go to the jury room.

13 Okay. Anything further from the  
14 Plaintiff?

15 MR. CAMPBELL: No, Your Honor.

16 THE COURT: Anything further from the  
17 Defendant?

18 MR. DE VRIES: Your Honor, may we get the  
19 official time that each side has used from Your Honor?

20 THE COURT: Yes. Plaintiff has used 1  
21 hour and -- I'm sorry -- that would be 12 -- 13 hours  
22 and 45 minutes. Defendant has used 12 hours and 57  
23 minutes.

24 MR. DE VRIES: Thank you, Your Honor.

25 May I confer with my counsel for one

1 moment, if you don't mind?

2 THE COURT: Uh-huh.

3 MR. CAMPBELL: Just to be clear, Your  
4 Honor intends to go into the RAND trial tomorrow after  
5 the jury --

6 THE COURT: Into the what?

7 MR. CAMPBELL: Into the RAND trial, the  
8 bench trial portion of the phase --

9 THE COURT: Yes, uh-huh.

10 MR. CAMPBELL: -- once the jury starts to  
11 deliberate?

12 THE COURT: I think we'll do that  
13 tomorrow --

14 MR. CAMPBELL: Okay.

15 THE COURT: -- unless you want to do it  
16 today.

17 How long will that take?

18 MR. CAMPBELL: Your Honor, Defendants  
19 will go first. I don't think Plaintiffs are going to  
20 have a whole lot.

21 THE COURT: How long will your --  
22 Counsel, how long do you anticipate taking with the  
23 evidence to the Court?

24 MR. DE VRIES: We anticipate  
25 approximately 90 minutes, give and take -- give or take



1 about, you know, 15 minutes, Your Honor.

2 THE COURT: Okay. All right. Well,  
3 we'll do that while the jury's out tomorrow.

4 And you'll have how much for --

5 MR. CAMPBELL: I'm going to say about an  
6 hour.

7 THE COURT: Okay. All right. We'll do  
8 that tomorrow afternoon. It will make for a good  
9 afternoon.

10 All right. Anything further?

11 MR. DE VRIES: Nothing further, Your  
12 Honor.

13 THE COURT: All right.

14 MR. CAMPBELL: I'm going to hand up the  
15 Rite-Hite case.

16 THE COURT: All right. Very well.

17 MR. CAMPBELL: Thank you.

18 THE COURT: All right. Thank you. And  
19 we will see you in the morning.

20 COURT SECURITY OFFICER: All rise.

21 (Court adjourned.)

22

23

24

25

1 CERTIFICATION

2

3 I HEREBY CERTIFY that the foregoing is a  
4 true and correct transcript from the stenographic notes  
5 of the proceedings in the above-entitled matter to the  
6 best of our abilities.

7

8

9 /s/ Shea Sloan  
SHEA SLOAN, CSR  
10 Official Court Reporter  
State of Texas No.: 3081  
11 Expiration Date: 12/31/14

12

13

/s/ Judith Werlinger  
14 JUDITH WERLINGER, CSR  
Deputy Official Court Reporter  
15 State of Texas No.: 731  
Expiration Date 12/31/14

16

17

18

19

20

21

22

23

24

25